JULY, 2005 Volume 14, Number 2

The Zealous Advocate

CPCS Training Bulletin

CHIEF COUNSEL'S MESSAGE

William J. Leahy, Esq.

As this issue of the Zealous Advocate goes to print, the Senate just passed legislation to increase the private counsel rates to the level recommended by the Indigent Defense Commission for Fiscal Year 2006. Those rates are as follows:

- homicide cases - $100 per hour
- superior court non-homicide, including sexually dangerous person cases - $60 per hour
- district court cases and children in need of services cases - $50 per hour
- children and family law cases, care and protection cases, sex offender registry cases and mental health cases - $50 per hour

The Senate vote was 37 – 0. Legislation providing for the same rates is now before the House of Representatives for consideration. We are working hard to win its approval in the House and to secure the concurrence of Governor Romney so that this constitutional crisis will end. Further information will be announced as events unfold.

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CPCS Criminal Defense Training Unit:
Cathleen Bennett, Training Director
Paul Rudof, Staff Attorney
Kristen Munichiello, Administrative Assistant

MESSAGE FROM THE TRAINING UNIT

In this summer of crisis, we send you this issue of the Zealous Advocate and hope that you will find it useful in your practice. We are very grateful to the attorneys who wrote articles for this issue.

Wendy Wayne, the CPCS Immigration Specialist, provides guidance to criminal defense practitioners in **Immigration News and Views**. She addresses how to get your client back from immigration custody and motions to revise and revoke. We intend to make immigration updates a regular feature of the bulletin.

Debra Krupp wrote about **Lifetime Community Parole**. Increasingly, our clients are facing this sentence and Debra warns that it is essential for defense counsel to object to the imposition of this severe sanction in every case and preserve constitutional challenges as well. We include with her article a sample motion in opposition to LCP written by John Osler, the Attorney in Charge of the CPCS Cambridge Office.

Jane Larmon White contributed **Fresh Complaint Update**. The doctrine is being re-examined by the Supreme Judicial Court in *Commonwealth v. King.* Jane wrote an amicus brief advocating that the Court abandon the doctrine. She explains the position that she argued in her brief on behalf of CPCS. To the degree that the Court permits its continued use in sexual assault cases, Jane suggests that the Court require a new limiting instruction, which she included in her article. *King* is still under advisement.

Carol Donovan wrote two "Watch out" memos, which we have reprinted. In **Watch Out: SJC Adopts A Forfeiture by Wrongdoing Exception to the Hearsay Rule** Carol explains the Courts decision in *Commonwealth* v. *Edwards* and offers some tips about how to deal with the issue. In **Watch Out: SJC Rules That Defendants Are Entitled to Presence of Counsel at Presentence Interviews Conducted by Probation**, Carol explains that ruling in *Commonwealth* v. *Talbot* and offers useful practice tips for how to handle presentence interviews of our clients by probation.

Paul Rudof wrote the **Casenotes** for the bulletin and included **keyword summaries** at the beginning of that section for your ease in finding cases of interest. We also in included a calendar of upcoming training events.

We expect to send out the next issue of the Zealous Advocate in August. Please take a moment to share with us your suggestions for future articles and the improvement of the training bulletin. We would like to hear from you. Please send your comments and suggestions to Cathleen Bennett at cbennett@publiccounsel.net.

INDIGENT DEFENSE NEWS

NOTICE TO ALL PRIVATE COUNSEL CRIMINAL APPEALS ATTORNEYS: E-MAIL

Since almost all appellate assignments are now made by e-mail, it is vitally important that you inform us of your e-mail address and keep us apprised of any change in your address. In addition, we will soon establish a listserv for the CPCS appellate panel for which invitations will be issued by e-mail. If you have not received any notice from us of available assignments in the past several months, we probably do not have your current e-mail address. Please send your e-mail address information to our Assignment Coordinator, Dolly Mele, at dmele@publiccounsel.net.

NOTICE TO ALL PRIVATE COUNSEL CRIMINAL APPEALS ATTORNEYS: CONFIDENTIALITY OF ALLEGED VICTIMS' NAMES IN SEXUAL ASSAULT APPEALS

Please be aware that G.L. c. 265, §24(c) requires that the name of the alleged victim in a rape, assault with intent to rape, or indecent assault and battery on a child under 14 must be redacted. The Appeals Court has informed us that it intends to enforce this provision rigorously. If the court finds that the name of the alleged victim has not been redacted from the brief and/or the record appendix, it will require that the attorney come to the court and manually redact the name from all copies.

NOTICE TO ALL CPCS ATTORNEYS AND ATTORNEYS REPRESENTING INDIVIDUALS IN SEX OFFENDER CLASSIFICATION CASES

As of July 1, 2003, the Sex Offender Registration and Notification statute was amended to require payment of a registration fee of $75.00. The fee must be paid upon classification and annually at the time of registration verification. The procedures for collection of the fee are set forth in M.G.L. c. 6 § 178Q and 803 CMR 1.28(2), 1.29(2) and 1.30(2).

WHO IS REQUIRED TO PAY THE FEE?

All persons required to register as sex offenders. However, the fee need not be paid until all legal challenges provided for in M.G.L. c. 6 §§ 178L & M are exhausted. These challenges include the evidentiary classification hearing before the Board and review of the hearing examiner decision in the superior court.

WHEN MUST THE FEE BE PAID?

For individuals finally classified as level one offenders, the fee must be paid upon registration, following all litigation before the Board Hearing Examiner and in the Superior Court. For individuals finally classified as level 2 or level 3 offenders, the fee must be paid no later than 30 days after registration at the police station , following all litigation before the Board Hearing Examiner and in the

For all registered and finally classified offenders, the fee must be paid annually in the month of the registrant's date of birth.

WHEN DOES THE FEE REQUIREMENT END?

The duty to pay the registration fee ends upon termination of the duty to register.

HOW DOES THE FEE GET PAID?

At the time of post-litigation registration or annual verification, registrants receive a Sex Offender Registration Fee Invoice to complete and mail with the $75.00 to a designated address in an envelope provided.

HOW MAY ONE OBTAIN A WAIVER?

Registrants may request waiver of the registration fee no later than 30 days after post-litigation registration. The registrant may request waiver by checking off the box indicating that he is indigent and unable to pay the fee on the Sex Offender Registration Fee Invoice. This invoice is mailed to the address designated on the form. The Sex Offender Registry Board then sends indigency forms to the registrant. When the indigency forms are received by the Sex Offender Registry Board, a determination is made as to whether undue hardship exiwaiver request must be made at the time of each annual registration.

NOTICE TO CPCS DISTRICT COURT AND JUVENILE DELINQUENCY CERTIFIED ATTORNEYS

SORB Certification Training will take place December 5th at MCLE, Winter Place, Boston, MA. This event is mandatory for all CPCS criminal defense practitioners on the District, Juvenile and Superior Court lists- **except those who have already taken it**. This is a one-time training requirement in order to maintain your certification. If you have already attended one of the Sex Offender Registration & Notification training programs offered in 2002, 2003, and 2004 then you do not need to attend this program. Please stay tuned for news about how to register and other important details.

CPCS TRAINING NEWS

CPCS ANNUAL CONFERNCE

Over 425 people registered for the CPCS Annual Conference On May 5th at the Worcester DCU Center. The conference was dedicated to the memory of Edward J. Duggan. Dorothy Roberts, author of *Shattered Bonds: The Color of Child Welfare*, Basic Books 2002, delivered the Keynote presentation. Professor Roberts addressed the role of race in the child welfare and criminal justice systems, the mass incarceration of people of color, and the devastating impact these phenomena and policies have on communities of color. We picked up the theme of racial injustice and our search for solutions in both criminal and CAFL programs later in the day. We also presented programs on immigration, mental health, sexually dangerous person litigation, the youth development approach to representing children and parents, and hot topics in criminal defense.

We are very grateful to all of those who generously shared their insights, strategies, and knowledge with us by teaching at the conference this year. We also thank the many private lawyers and CPCS staff attorneys who attended the conference this year. Thank you all for making the day a success.

2005 Annual Conference presenters:

Robert Ward, Dean of Southern New England Law School; William White, Davis, Robinson & White; Victoria Bonilla, Bourbeau & Bonilla; Christopher Skinner, CPCS, Senior Trial Counsel; Debra Shopteese, CPCS, Attorney in Charge, Roxbury; Beverly Cannone, CPCS, Dedham; John Darrell, CPCS, Attorney in Charge, Brockton;

Panelists: Hon. Leslie Harris, Associate Justice, Boston Juvenile Court; Susan Harris O'Connor, Director of Family Services at Children Services of Roxbury; Andrew Hoffman, CPCS, CAFL; Wendy S. Wayne, CPCS Immigration Law Specialist; Susan Church, Salsberg & Schneider; Omayra Gonzalez; Stan Goldman, Director of Mental Health Litigation, CPCS; Hon. Maurice Richardson, First Justice Dedham District Court (retired) & Assistant Professor, Department of Psychiatry, University of Massachusetts Medical School; Lanita Maryland, Officer, Boston Police Department; Stephanie Page, Senior Trial Counsel, CPCS; Brownlow Speer, CPCS Attorney in Charge, Appeals Unit; Paul Rudof, CPCS, Training Unit; Debra Krupp, CPCS, Appeals Unit; Nona Walker, CPCS, Appeals Unit; Chauncey Wood , Shea, LaRocque & Wood; John Swomley, Swomley & Associates; Christopher Dearborn, CPCS, Salem Office; Joshua Dohan, CPCS, Director of Youth Advocacy Project; Margaret Winchester and Susan Dillard CPCS, Co-Directors Children and Family Law Program; David Hirsch, CPCS, Mental Health Litigation Unit; Greg Bal, CPCS, Alternative Commitment Unit; Margaret Lunevitz, CPCS, Mental Health Litigation Unit; William Leahy, CPCS Chief Counsel; Patricia Wynn; CPCS Deputy Chief Counsel; Andrew Silverman, Deputy Chief Counsel; Wendy Wolf, CPCS, Juvenile Defense Network Coordinator, Youth Advocacy Project.

2005 JURY SKILLS COURSE

This year's jury skills course was attended by 24 bar advocates and public defenders who gave up a week to come and work on a pending case. The jury skills course is an advanced trial practice course in which the participants work on their advocacy skills in the context of the trial of one of their own cases. The list of jury skills participants appears at the back of this issue of the bulletin.

SCHOLARSHIPS AWARDED TO NATIONAL CRIMINAL DEFENSE COLLEGE

The following bar advocates and public defenders were awarded CPCS scholarships to attend the Trial Practice Institute at the National Criminal Defense College in Macon, Georgia this summer. The TPI is a two-week long intensive trial practice course attended and taught by criminal defense lawyers from all over the nation. Each year CPCS gives scholarships to criminal defense attorneys who represent the indigent. Watch the Training Bulletin and E-Bill for news about the scholarship application deadlines for next year's College.

Pamela Saia
Joseph Griffin
Kathleen O'Connell
Margaret Fox
Jason Benzakan
Paul Rudof
Susan Hamilton

New Yahoo Group for CPCS Private Counsel Up and Running

The "CPCSDistrict-SuperiorCourtCounsel" Yahoo egroup is up and running with participation from lawyers all over the state. This list serve is an invitation only egroup for current CPCS District and Superior Court Assigned Counsel. CPCS Senior Trial Counsel Stephanie Page is the group's moderator. (Members of law enforcement, prosecutor's offices, and non-CPCS attorneys are not eligible for membership.) The group's goal is to share substantive ideas, information, motions and memos that involve common and novel case-related [not political or fee related] issues and to keep all of us as informed and up to date as possible. Members have online access to motions and other resources in the "Files" section of the Yahoo web group. The material contained in the files section is contributed by members of the group. Members receive and post e-mail messages through the group; users can choose to get the day's postings all at once in a single "daily digest" email, or separately as each one gets posted, or can elect not to receive email at all and monitor the postings by logging on to the group's website. A great deal of useful information has been shared since the group began. If you are on the CPCS private counsel criminal list(s) and are not already a member and would like to join, please send an email containing your name, email address, and indicate the CPCS criminal list(s) to which you belong. Address the email to Stephanie Page at spage@publiccounsel.net. She will reply with instructions about how to join the group.

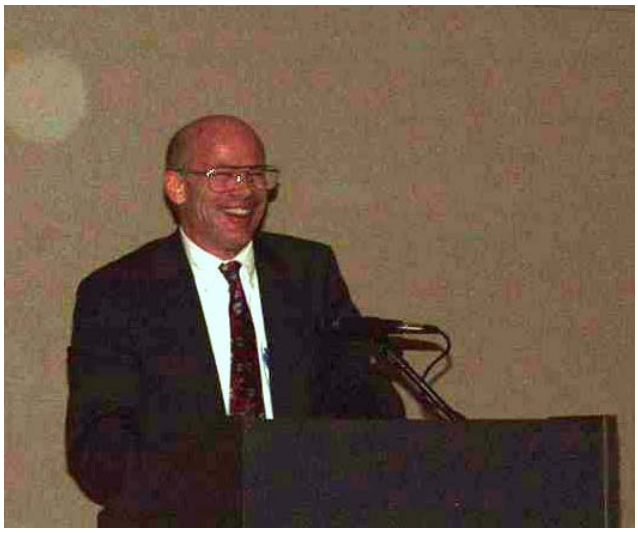
AWARDS PRESENTED AT CPCS ANNUAL CONFERENCE

In Recognition And Gratitude For Outstanding Dedication And Performance On Behalf Of Indigent Clients

The following awards were presented at the CPCS Annual Conference in May. The speeches were inspiring, entertaining, and moving.

The **"Edward J. Duggan Award for Outstanding Service"** is given to both a Public Defender and Private Counsel attorney and is named for Edward J. Duggan, who served continuously from 1940 to 1997 as a member of the Voluntary Defenders Committee, the Massachusetts Defenders Committee, and the Committee for Public Counsel Services. The award has been presented each year since 1988 to the public defender and private attorney who best represent zealous advocacy — the central principle governing the representation of indigents in Massachusetts.

The 2005 Duggan Award for a Private Counsel attorney was presented to Charles K. Stephenson



CHARLES K. STEPHENSON

Charles K. Stephenson joined the CPCS Appeals and Post Conviction panel in 1988. He has also served as a mentor to new and seasoned appellate attorneys since 1993. The more than 130 appeals and post-conviction matters handled by Attorney Stephenson on behalf of CPCS include *Commonwealth v. Tolentino* and *Commonwealth v. Arriaga* pursuant to which the jury commissioner was directed to amend the juror confirmation form to require potential jurors to disclose their racial and ethnic background. Attorney Stephenson joined the field of law after a career as a public school teacher in Maine and Massachusetts. He is a graduate of Western New England College School of Law and Brown University, where he participates in several alumni activities. He practices law in western Massachusetts and has an office in South Hadley.

The **"Edward J. Duggan Award for Outstanding Service"** is given to both a Public Defender and Private Counsel attorney and is named for Edward J. Duggan, who served continuously from 1940 to 1997 as a member of the Voluntary Defenders Committee, the Massachusetts Defenders Committee, and the Committee for Public Counsel Services. The award has been presented each year since 1988 to the public defender and private attorney who best represent zealous advocacy — the central principle governing the representation of indigents in Massachusetts.

The 2005 Duggan Award for a Public Defender was presented to Christopher Skinner

CHRISTOPHER SKINNER, ESQ.

Chris Skinner is a graduate of Bowdoin College and Saint Louis University School of Law. In 1978, he began his legal career as a staff attorney at Neighborhood Legal Services of Lynn. In 1980, Chris became a public defender and joined the Worcester office of the Massachusetts Defenders Committee. Over the past 25 years, Chris has worked as a trial attorney in the Worcester office, the Boston Trial Unit and the Salem office of CPCS. He also did a stint in the CPCS Appeals Unit. From 1992 to 1995, Chris was the training director for CPCS, and in that capacity he oversaw the creation and presentation of the massive training program through which more than two thousand attorneys were trained during the transition from trial *de novo* to the "one-trial" system. Chris was also responsible for an array of MCLE trainings, including how to try a murder case, and for the creation of CPCS' week-long Jury Skills training program. Since 1995, Chris has served as one of CPCS' three Senior Trial Counsel, trying cases and assisting other attorneys in CPCS offices across the Commonwealth. Known for his legal knowledge, analytical abilities, and trial skills, Chris has also become something of an expert on DNA cases, and the use of computer technology in preparing for trial. But he is admired not just for his great trial skills and expertise, but more so for his steadfast commitment and dedication to represent ing indigent clients and for the great integrity and common sense which are at the core of everything he does.

The **"Thurgood Marshall Award"** recognizes a person who has made significant contributions to the quality of the representation we provide to our clients.

THE AMERICAN CIVIL LIBERTIES UNION OF MASSACHUSETTS JOHN REINSTEIN, DAVID HOOSE and BILL NEWMAN

When the going got excruciatingly tough in Hampden County this time last year, when the political and budget processes broke down, when the right to counsel was on the ropes, when activist, systemic litigation became the only means to enforce the right to counsel for the poor, we knew exactly where to turn – to the ACLU of Massachusetts and their learned and passionate litigators who enforce equal rights and civil liberties for all.

JOHN REINSTEIN

John Reinstein, ACLU litigator since 1971, is a frequent collaborator with CPCS, notably in the challenge to the DNA database statute, Landry v. Attorney General, 429 Mass. 336 (1999), in challenges to the sex offender registry statute and the juvenile transfer law and, most recently, in Commonwealth v. Wilson, 441 Mass. 390 (2004), the "plain feel" doctrine. John has litigated issues concerning freedom of speech, freedom of religion, capital punishment, women's rights, privacy, police misconduct and prisoners' rights.

DAVID HOOSE

David Hoose began his career as a public defender with the Springfield office of the Massachusetts Defenders Committee from 1980 to 1983. He has been a partner with the firm Katz, Sasson, Hoose and Turnbull since 1984. David currently represents a client charged with capital murder in the Federal District court in Boston. In addition, for many years David has represented two Georgia death penalty defendants in post-conviction proceedings. Several years ago, David's defense team won the Marshall Award for its representation of Kristen Gilbert in her federal death penalty trial.

BILL NEWMAN

Bill Newman, a partner in the Northhampton law firm Lesser, Newman, Souweine & Nasser since 1976, has been Director of the Western Regional office of the Massachusetts ACLU since 1987. Whether it is by representing death row inmates, Guantanamo detainees, criminal defendants, and due process-deprived students; or by contributing to public education as columnist, radio commentator and public speaker; or by leading the fight for legal services and against the death penalty; Bill is a leading voice in western Massachusetts for a just and humane society.

The **"Jay D. Blitzman Award for Youth Advocacy"** is presented annually to a person who has demonstrated the commitment to juvenile rights which was the hallmark of Judge Blitzman's long career as an advocate. Judge Blitzman was a public defender for twenty years and, in 1992, he became the first director of the Youth Advocacy Project. The award honors a person, who need not be an attorney, who has exhibited both extraordinary dedication and excellent performance in the struggle to assure that children accused of criminal conduct or are otherwise at risk are treated fairly and with dignity.

The 2005 Blitzman Award was presented to Patricia A. Downey

PATRICIA A. DOWNEY

Patricia Downey is a private practitioner and staff attorney for the Pilgrim Advocates in Plymouth County. She is also a former CPCS staff attorney and has worked at the law firm Salsberg, Cunha and Holcomb. Patty graduated *cum laude* from Suffolk University Law School in 1995. Prior to practicing law, Patty was in the field of public relations. She is the first person in Massachusetts to use the *Roper v. Simmons* case and the recent research on adolescent brain development to argue that our law which automatically transfers youth between the ages of 14 and 17 charged with first and second degree murder is unconstitutional. Patty has persuasively argued that these juveniles should remain within the jurisdiction of the juvenile court. Patty is also a committed mentor and advisor; many lawyers in Plymouth County and CPCS have benefited from her generous and sage advice. Her juvenile clients receive sensitive and experienced counsel, always knowing that they will be heard. Patty has the remarkable quality of being relentless in the courtroom and at the same time earning the respect of her adversaries. As staff attorney for Pilgrim Advocates, Patty has played an important role in delivering juvenile delinquency specific trainings. There is no one more deserving than Patty Downey for the Jay Blitzman Award.

The **"Paul J. Liacos Mental Health Advocacy Award"** is presented annually to a public defender or private attorney whose legal advocacy on behalf of indigent persons involved in civil and/or criminal mental health proceedings best exemplifies zealous advocacy in furtherance of all clients' legal interests.

The 2005 Liacos Award was presented to George B. Crane

GEORGE B. CRANE

George Crane hung up his first shingle in Pittsfield slightly more than 50 years ago, right after graduating from Boston College Law School. He liked it. As he said to the Berkshire Eagle in a feature story last month, "I was able to accomplish something for somebody." George is still practicing in Pittsfield, and has accomplished many things. He is former president of the Berkshire Bar. He has handled twenty-three murder cases. He represented the first person ever charged with marijuana possession in Berkshire County. More to the point, in the past year, he won five Sexually Dangerous Persons trials in a row. He explained the attraction of SDP cases to the Eagle reporter: "It's interesting to be the only advocate for someone who's hated." He is eight years older than the oldest sitting judge in Massachusetts. He has five children and, we think, four grandchildren. Even prosecutors say good things about him. We hope he doesn't retire.

The **"Mary C. Fitzpatrick Children and Family Law Award"** is presented annually to a public or private attorney who demonstrates zealous advocacy and an extraordinary commitment to the representation of both children and parents in care and protection, children in need of services, and dispensation with consent to adoption cases. The award was named for Judge Fitzpatrick in recognition of her longstanding dedication to the child welfare process and the well-being of children in the Commonwealth. Judge Fitzpatrick has long been an advocate for the recognition of rights of children and parents as well as for the speedy resolution of child welfare matters.

The 2005 Fitzpatrick Award was presented to Anita Baas Sullivan

ANITA BAAS SULLIVAN

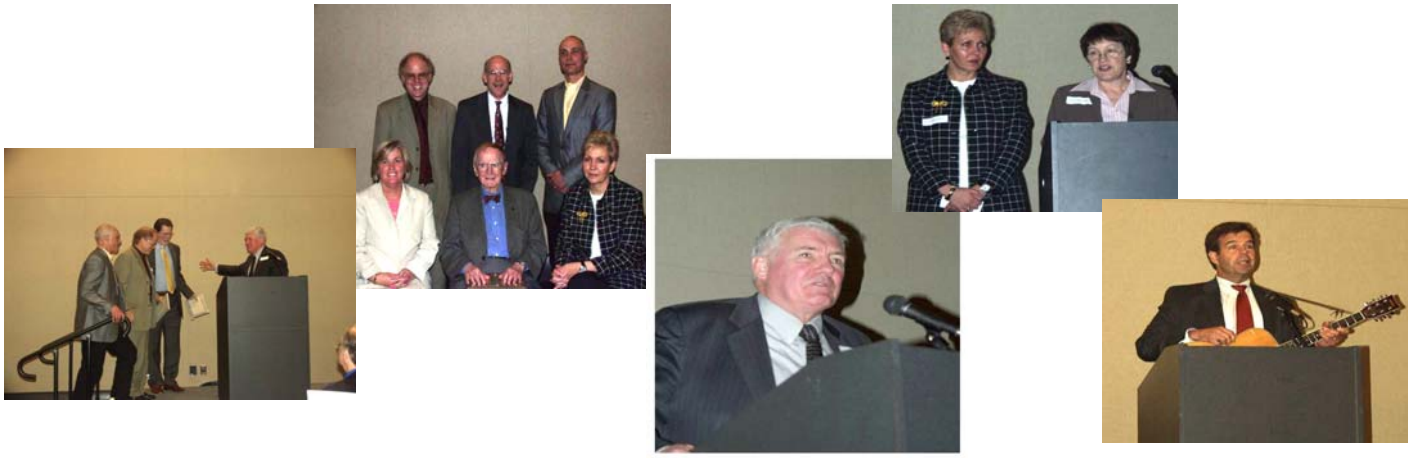
Anita B. Sullivan, Esq. has been practicing law in Middlesex and Essex counties since 1995. She has focused her practice on state intervention, family law, and education law – any practice area that involves issues related to children and their families. Attorney Sullivan has been on the CPCS Children and Family Law (CAFL) panel for ten years. In addition, she serves on the CAFL appellate panel and is a mentor for new CAFL attorneys in Essex County. She also has been certified as a court investigator since 1993. Attorney Sullivan has expertise in child development and trauma, which she has shared with other attorneys in continuing education programs. Attorney Sullivan epitomizes the best of a CAFL trial lawyer. She demonstrates a deep commitment to this work. She does the best work possible for her clients. Attorney Sullivan is also a powerful resource to the local bar. She willingly shares her time and expertise with others. She has raised the quality of representation for many other clients by sharing her knowledge, talent and enthusiasm with other attorneys.

DEDICATION

Michael Duggan Bill Leahy Rosemary Duggan McKitrick

This year's Annual Training conference was dedicated to the memory of Edward J Duggan, who died at the age of 89 on August 10, 2004. "Mr. Duggan", as he was known by all, was the true pioneer and enduring champion of the right to counsel for the poor in Massachusetts. For fifty-seven years – from his graduation from law school and employment as one of two attorneys with the Voluntary Defenders Committee in 1940, to his membership on that Committee as an associate and then partner at the Boston law firm Lyne, Woodworth and Evarts, to his role in the legislation which established the Massachusetts Defenders Committee in 1960, to his role as MDC chairman during its dramatic improvement in the 1970s, to his leadership in the process which resulted in the enactment of chapter 211D and the establishment of CPCS in 1983, to his invaluable role as interim chair of CPCS in its formative months, to his role as active and conscientious CPCS member until his resignation in 1997 – Ed Duggan was a constant presence who communicated an unrelenting insistence that the poor receive a quality of representation equal to that of the rich.

No principle could be more simple; and none could be more radical. We remember and revere Mr. Duggan because he never retreated from this insistence upon equal justice for all. This is why we annually honor the best lawyers for the poor with an award which bears his name. This is why our agency headquarters conference and training room has been dedicated in his memory, and bears his visage on its wall. This is why he is, and always will be, our hero. Let every person attending this training conference today rededicate herself to fulfilling his vision for equal justice.



PRACTICE NOTES AND UPDATES

WATCH OUT: SJC ADOPTS A FORFEITURE BY WRONGDOING EXCEPTION TO HEARSAY RULE

Carol Donovan, Esq, CPCS Boston

Commonwealth v. Edwards, SJC (July 1, 2005),

In its recent decision in Commonwealth v. Edwards, the SJC adopted as Massachusetts law the "Forfeiture by Wrongdoing Exception" to the hearsay rule. The "forfeiture by wrongdoing" doctrine holds that "testimony of an unavailable witness may be admitted substantively against defendants who...procure[] the unavailability of that witness."

The Commonwealth claimed that its key witness against Edwards refused to testify because Edwards had persuaded him not to do so, and that the Commonwealth therefore should be entitled to introduce the witness's grand jury testimony substantively at trial. The defendant had had no opportunity to cross-examine the witness. Although the motion judge found as a matter of fact that the defendant had not caused the witness's refusal to testify, the SJC remanded the case to the superior court for reconsideration in light of its acceptance and articulation of the "Forfeiture by wrongdoing" exception.

These are the key ingredients of Massachusetts "forfeiture by wrongdoing."

> "We hold that a defendant forfeits, by virtue of wrongdoing, the right to object to the admission of an unavailable witness's out-of-court statements on both confrontation and hearsay grounds on findings that (1) the witness is unavailable; (2) the defendant was involved in, or responsible for, procuring the unavailability of the witness; and (3) the defendant acted with the intent to procure the witness's unavailability. A defendant's involvement in procuring a witness's unavailability need not consist of a criminal act, and may include a defendant's collusion with a witness to ensure that the witness will not be heard at trial."

The prosecution must prove that forfeiture is appropriate by a preponderance of the evidence. The parties are entitled to a pretrial evidentiary hearing for determination of forfeiture. Hearsay evidence is admissible at the hearing.

The "forfeiture" doctrine crafted by the SJC is unfortuneatly very broad. (Footnote 23 of the opinion reassures us that informing a witness of the right to remain silent does not, standing alone, constitute "forfeiture by wrongdoing.") The only good news for defendants is that the Commonwealth may not spring this basis for admission of hearsay upon the defendant during the course of trial. A pretrial evidentiary hearing is required. Written findings and rulings should be requested in order to preserve the issue for appellate review in the event of a conviction.

WATCH OUT: SJC RULES THAT DEFENDANTS ARE ENTITLED TO PRESENCE OF COUNSEL AT PRESENTENCE INTERVIEWS CONDUCTED BY PROBATION

Carol Donovan, Esq., CPCS Boston

Commonwealth v. Talbot, (SJC, July 7, 2005)

In its decision in Commonwealth v. Talbot, the SJC exercised its supervisory power to hold that a defendant, **upon request**, is entitled to the presence of counsel at a presentence interview conducted by the probation department.

"We hereby direct that, **if requested by the defendant or her attorney**, probation officers must give the defendant's attorney notice and a reasonable opportunity to attend a presentence interview of the defendant." (emphasis added)

This is currently the law in federal courts, pursuant to Fed.R.Crim.P. 32. It is not, however, mandated by Mass.R.Crim.P. 28, which governs state court presentence interviews. The SJC was persuaded by the abuses that occurred in this case, and by case law from other jurisdictions, that this rule should be imposed henceforth in Massachusetts.

Justina Talbot was interviewed by a probation officer in the absence of counsel, despite counsel's request that she be present at the interview. When Talbot inquired at the outset of the interview why her attorney was not present, the probation officer informed her that he was conducting the interview as her advocate and that her attorney need not be present. The defendant was in custody for the first time in her life, was on lockdown, on suicide watch, and was incoherent. Nevertheless, the probation officer proceeded to elicit her version of the events, since she had not testified at trial. The probation officer persuaded her to sign four waivers to allow him access to privileged psychologist and psychiatric records. All of this information was included in the presentence report. When the presentence report was subsequently challenged, counsel for the probation department argued that probation needed this information in order to supervise the defendant, and that it intended to transmit the information to the appellate division in case of a sentence appeal, to the sex offender registry board, to the department of corrections, and to other appropriate state agencies. The court sentenced the defendant to thirty-five to forty years in the state prison.

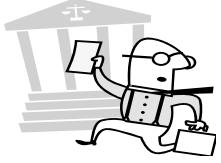
PRACTICE TIPS

1. Note that the right to the presence of counsel vests upon a request either by the defendant or by counsel. **Counsel should always request to be present at the presentence probation interview in order to avoid waiver of this right.**

2. At the time the court requests that probation prepare a presentence report, **counsel should inform the court that she/he wishes to be present at the presentence interview**. A written notification should subsequently be filed with the court.

3. **A written request to be present at the probation presentence interview should be sent to the chief probation officer and to the probation officer who is to conduct the interview.**

4. The notification to the court and the letter to probation should cite to Commonwealth v. Talbot and should quote the relevant part of the opinion. Include a copy of the opinion with the letter to probation.



IMMIGRATION NEWS AND VIEWS

Wendy S. Wayne, Esq. CPCS Immigration Law Specialist

How to get your client back from immigration custody

Do you have a client with pending criminal charges in a Massachusetts court who is being held in immigration custody? Do you want him brought into state court to resolve the criminal case on which you represent him?

Noncitizens detained pending removal hearings or actual removal from the U.S. are held in federal custody by Immigration and Customs Enforcement (ICE). Without a federal court order, ICE does not have to transport an immigration detainee to state court to answer on a criminal case. If your client is in immigration custody and you do nothing to facilitate his transportation to state court, he will not appear on your case and a default warrant will issue. If the client is ultimately deported, the default warrant will remain outstanding indefinitely, unless he re-enters the U.S. and is arrested on the warrant. If you decide that you want your client brought into court to resolve his criminal case, the Office of Detention and Removal (DRO – a division of ICE) has recently created the following procedure:

> Ask the state court judge to issue a habe to "**ICE – DRO, Bruce Chadbourne, Field Office Director, JFK Building, Rm. 1775, Boston, MA 02203**". **Habe should be faxed to James Brown at 617-565-3097 *and* 617-989-6635**. The defendant will be sent to Suffolk County House of Correction at South Bay and ICE will coordinate transportation to the proper court. If the habe is not honored, call **617-565-3304**.

This procedure applies only to immigration detention facilities in New England (if your client is held in Oakdale, LA, you are out of luck). If you try this, please call or email Wendy Wayne (see phone and email information below) to let her know if it worked and to report any problems, so she can address them with the appropriate officials at ICE.

Motions to revise and revoke pursuant to Mass.R.Crim.P. 29

You should consider filing a motion to revise and revoke pursuant to *Mass.R.Crim.P.29* in every case in which the client is not a U.S. citizen. Changes in immigration law are often held to be retroactive. If a Rule 29 motion has been filed and a subsequent change in immigration law creates immigration consequences from the original sentence, counsel then has the ability to request a revision of the sentence to avoid such consequences.

Motions to revise and revoke are particularly important for a noncitizen who receives a sentence of one year or more on a sentence-based aggravated felony. Sentence-based aggravated felonies are those offenses listed in the aggravated felony definition, *8 U.S.C. 1101 (a)(43)*, which require a sentence of one year or more in addition to a conviction (other offenses listed in the definition require only a conviction of the offense to constitute an aggravated felony). The most common categories of sentenced-based aggravated felonies are crimes of violence, theft offenses (inc. receiving stolen property), burglary, forgery, bribery, obstruction of justice and perjury. If a noncitizen receives a sentence of one year or more on an offense within one of these categories, he has very few forms of relief or defenses to deportation available to him. Not only will the client be deported, he will be held in mandatory detention until his deportation, and he will be barred from returning to the U.S. for the rest of his life. If a motion to revise the sentence has been filed, counsel has reserved the possibility that the sentencing judge can be persuaded in the future to reduce the sentence to less than one year.

A motion to revise or revoke a sentence must be filed within sixty days of imposition of the sentence, or "within sixty days after receipt by the trial court of a rescript issued upon affirmance of the judgment or dismissal of the appeal, or within sixty days after entry of any order or judgment of an appellate court denying review of, or having the effect of upholding, a judgment of conviction." A court may revise or revoke a sentence "if it appears that justice may not have been done." *Mass.R.Crim.P. 29(a)*. Only facts that existed at the time of sentencing may be grounds to allow a motion. *Commonwealth v. Layne*, 386 Mass. 291, 295 (1982). **Attorneys should not discuss immigration consequences in an affidavit in support of a motion to revise and revoke, as such a consequence is considered collateral and an invalid basis on which to dispose of a case.** *Commonwealth v. Quispe*, 433 Mass. 508, 513 (2001); *Commonwealth v. DeJesus*, 440 Mass. 147, 153 (2003). Nothing prevents an attorney, however, from discussing immigration consequences with a judge off the record or at sidebar.

An affidavit with supporting grounds must be filed at the same time as the filing of a motion to revise and revoke. *Mass.R.Crim.P. 29(b); Commonwealth v. DeJesus*, 440 Mass. at 152. Attorneys often wonder what grounds to put forth in support of a motion to revise and revoke when it must be filed shortly after the disposition of a case. The Reporter's Notes to Rule 29 offer some guidance:

> The rule governs reductions of sentences motivated by demands of fairness. It is thus a rule which accords the trial judge broad discretion. As was stated in District Attorney for the Northern District v. Superior Court, 342 Mass 119 (1961):
>
> Occasions inevitably will occur where a conscientious judge, after reflection or upon receipt of new probation reports or other information, will feel that he has been too harsh or has failed to give due weight to mitigating factors which properly he should have taken into account.".
>
> Id at 128. If within sixty days after sentence has been imposed, the trial judge for any reason feels the sentence that has been imposed it too harsh he is permitted to reduce it sua sponte, although he is not permitted to consider events occurring after the original imposition. Commonwealth v Sitko, 372 Mass —, — (1977), Mass Adv Sh (1977) 668, 676-78.

Rule 29 does *not* require a motion to revise and revoke to contain new information that existed but was not presented at the time of sentencing. The sentencing judge may allow a motion to revise and revoke based on the same information that was presented at the sentencing hearing. The only exception is when a different judge than originally sentenced the defendant hears the motion [the motion judge may not consider the same evidence, as she would be substituting her judgment for that of the sentencing judge; she may only consider new evidence that existed, but was not presented, at the original sentencing hearing. (*Commonwealth v. Steele*, 42 Mass.App.Ct. 319 (1997)].

As the intent of a motion to revise and revoke is to allow the sentencing judge an opportunity to reconsider her sentence, the affidavit filed in support of the motion need not state new grounds but may put forth the same information that was presented at disposition. Of course, new information may be more effective at persuading a judge to grant the motion, but Rule 29 does not require such information to be contained in the affidavit. In most cases, it is wise to request that the motion not be heard at the time it is filed. With the passage of time, counsel may discover new information about the defendant that can be used to persuade a judge to reconsider her sentence. The new information, such as a medical condition or other mitigating information that was unknown but existed at the time of sentencing, can be submitted when the hearing is requested in the form of a supplemental affidavit.

Although it is often better to allow some time to pass before requesting a hearing on a motion to revise and revoke, do not allow too much time to pass. Rule 29 does not define how much time is excessive, but the Supreme Judicial Court held that a hearing six years after the filing of the motion was excessive. *Commonwealth v. Barclay*, 424 Mass. 377 (1997). Another note of caution: a sentencing judge has the authority to raise the original sentence when acting upon a motion to revise and revoke. *See Aldoupolis v. Commonwealth*, 386 Mass. 260 (1982). If negative information about a client has been discovered since the imposition of the sentence, it may not be wise to file a motion to revise his sentence. In most cases in which the defendant is a noncitizen, however, a motion under Rule 29 should be filed to provide the client with a future opportunity to avoid any immigration consequences of the original sentence.

For a more thorough discussion of motions pursuant to Rule 29, *see* Blumenson, Fisher, Kanstroom, eds., *Massachusetts Criminal Practice*, §44.3 (Lexis 2003).

If you need advice regarding the immigration consequences of criminal charges…

Wendy Wayne, a staff attorney in the Cambridge office, is the immigration law specialist for CPCS. She is available to advise staff attorneys and bar advocates as to potential immigration consequences of criminal charges and dispositions. Wendy works part-time and is in the office on Mondays, Tuesdays and Thursdays. She can be reached at 617-868-3300, ext.18 or at wwayne@publiccounsel.net. If you call or email her with questions, please provide her, at a minimum, with the following information: **the client's age, place of birth, current immigration status, when s/he first entered the U.S. and date(s) of any lengthy absences from the U.S., the immigration status of any family members in the U.S., current criminal charges, prior record and a phone number** where she can reach you to obtain additional information. It is helpful to fax her at 617-868-0421 any complaints/indictments, the client's record, a brief police report or statement of the case, and any immigration documents. Make sure you include a **date by when you need an answer** and allow her sufficient time to thoroughly research any effects of the criminal charges on your client's immigration status.

LIFETIME COMMUNITY PAROLE

(G.L. c.127, §133C; G.L. c.275, §18; and G.L. c.265, §45)

Debra Krupp, Esq., CPCS Boston

Many defendants are currently being sentenced to lifetime community parole in addition to terms or imprisonment and/or probation. Because the imposition of lifetime community parole may drastically effect a defendant's life and will frequently lead to further incarceration **IT IS IMPERATIVE THAT TRIAL COUNSEL OBJECT TO THE IMPOSITION OF LIFETIME COMMUNITY PAROLE IN EVERY INSTANCE.** Because the imposition of LCP is a direct consequence of a defendant's conviction (rather than a collateral consequence), failure to advise a client about the ramifications of LCP and/or failure to object to its imposition may constitute ineffective assistance of counsel. See Commonwealth v. Renderos, 440 Mass. 422, 429 (2003).

There are a number of constitutional challenges that should be raised in every case. In addition, there are a variety of challenges that are viable depending upon the charge and/or the defendant's criminal record. Below is a primer on lifetime community parole. A sample opposition motion follows.

What is Lifetime Community Parole?

Lifetime community parole ("LCP") is parole imposed for life. LCP is imposed **in addition** to any sentence of incarceration and/or probation. Parole is supervised by the parole board, and **violations are determined by the parole board, not by a court**.

LCP MAY NOT be imposed for an offense which was committed before the effective date of the law, that is, before September 10, 1999. See Commonwealth v. Fuller, 421 Mass. 400, 407-408 (1995) (presumption against retroactivity where statute does not specify that its provisions apply retroactively).

How Onerous is LCP?

Very onerous. A sample of the rules the parole board has required some offenders on LCP to comply with include:

Observe special curfew restrictions;
Keep a detailed driving log, including time, place and miles driven;
No nighttime driving;
Be monitored electronically for first 3 months of supervision, and possibly longer;
Be monitored by polygraph examination;
Keep a daily log of all activities;
May not possess a camera, unless approved by parole officer;
May not possess or use a computer program, unless approved by parole officer;
May not socialize or have contact with persons under 18 in work or social situations unless accompanied by adult who has been made aware of the parolee's sexual deviant tendencies

What Happens If The Defendant Violates The Terms Of His LCP?

If the defendant has completed serving his/her underlying sentence, a violation of LCP will result in the **enlargement** of the original sentence. After the defendant has completed serving his/her original sentence, the sentence is increased as follows:

First Violation:	30 days
Second Violation:	180 days
Third or Subsequent Violation:	365 days

There is **no maximum sentence**. In other words, a defendant could theoretically be sent back to prison, a year at a time, throughout his life.

Is Lifetime Community Parole Mandatory?

Imposition of LCP may be either mandatory or discretionary, depending upon the nature of the conviction and the defendant's criminal record.

Mandatory Imposition: LCP **must be** imposed for persons convicted of the following offenses: indecent assault and battery on a child (c.265, §13B); indecent assault and battery on a mentally retarded person (c.265, §13F), indecent assault and battery (c.265, §13H), rape (c.265, §22), forcible rape of child (c.265, §22A), statutory rape of child (c.265, §23), assault with intent to rape (c.265, §24), assault with intent to rape a child (c.265, §24B), kidnapping (c.265, §26), or an attempt to commit the foregoing offenses, **if the defendant has been previously convicted** of indecent assault and battery, rape, assault with intent to commit rape, unnatural and lascivious acts, drugging for sex, kidnap or of any offense which is the same as or necessarily includes the same elements of said offense.

Although there are no appellate court decisions on this issue, a fair reading of the caselaw would lead one to conclude that a defendant can be sentenced to LCP under this provision **only if the defendant was charged and convicted as a second and subsequent offender**. See G.L. c.265, §45.

Mandatory Exclusion: LCP **shall not** be imposed if the defendant is convicted of a first offense of one of the following offenses **and the Commonwealth moves to preclude imposition of LCP**: rape (c.265, §22), forcible rape of child (c.265, §22A), statutory rape of child (c.265, §23), assault with intent to rape (c.265, §24), assault with intent to rape a child (c.265, §24B), kidnapping (c.265, §26), drugging for sex (c. 272, §3), unnatural and lascivious acts with a child (c.272, §35A), or a first attempt to commit the foregoing offenses. See G.L. c.275, §18.

Discretionary Imposition: LCP **may** be imposed if the defendant is convicted of the one of the following offenses **if the Commonwealth moves** for imposition of LCP **and the court determines**, after a hearing, **to impose** LCP: indecent assault and battery of child (c.265, §13B), indecent assault and battery on a mentally retarded person (265, §13F), indecent assault and battery on a person over 14 (265, §13H), or an attempt to violate any of the foregoing crimes. See G.L. c.265, §45 and c.275, §18.

Discretionary Exclusion: LCP **must** be imposed if the defendant is convicted of one of the following offenses **unless the defendant moves** to preclude imposition of LCP **and the court determines**, after a hearing, **not to impose** LCP: rape (c.265, §22), forcible rape of child (c.265, §22A), statutory rape of child (c.265, §23), assault with intent to rape (c.265, §24), assault with intent to rape a child (c.265, §24B); kidnapping a child (c.265, §26); drugging for sex (c.272, §3), unnatural and lascivious acts with a child (c.272, §35A) or an attempt to violate any of the foregoing crimes. See G.L. c.265, §45.

Where Imposition of LCP is Discretionary, What Rules Govern the Hearing?

Defendant's Rights:

Right to counsel;
Right to testify;
Right to present witnesses;
Right to cross-examine witnesses;
Right to present information

Evidence: Rules of evidence do not apply. However, counsel should OBJECT to hearsay. Object on confrontation grounds, citing the 6th and 14th Amendments and art. 12. See Crawford v. Washington, 541 U.S. 36 (2004). Also object that the Commonwealth has not established good cause for denying the defendant his confrontation rights, and that the proffered hearsay is not reliable. See Commonwealth v. Durling, 407 Mass. 108 (1990); Commonwealth v. Joubert, 38 Mass. App. Ct. 943 (1995). NOTE: Crawford overrules Ohio v. Roberts, 448 U.S. 56 (1980), the case which formed the basis for the reliability test.

Mitigating and Aggravating Circumstances: The following **nonexclusive list** of mitigating and aggravating circumstances must be considered by the judge:

Defendant's character;
Defendant's propensities;
Defendant's criminal record;
Nature and seriousness of danger posed to any person or the community;
Nature and circumstances of the offense for which defendant is convicted.

Necessary Finding to Impose/Preclude Imposition of LCP: G.L. c.275, §18, paragraph 2, provides, "A finding by the court that such person shall be committed to community parole supervision for life shall be supported by clear and convincing evidence." Paragraph 3 of the statute provides, "If the judge finds, by clear and convincing evidence, that no reasons for community parole supervision for life ... exist, the judge shall not impose community supervision for life on such first offender." Although there are no appellate decisions on this issue, arguably these provisions **fail to adequately establish what finding the judge is required to make to determine whether or not to impose LCP,** and the LCP scheme therefore is **unconstitutionally void for vagueness**. This issue is currently before the SJC. Commonwealth v. Pagan, SJC-09332. The case was argued on April 6, 2005.

Standard of Proof: Clear and convincing evidence.

This standard of proof applies **both** to a court's **decision to impose** LCP and to a court's **decision not to impose** LCP. In Commonwealth v. Renderos, 440 Mass. 422, 432 n.10 (2003), the SJC noted the "ambiguity inherent in the[se] concurrent requirements." Arguably, as a result of this ambiguity, the statutory scheme is **unconstitutionally void for vagueness** under both the federal and Massachusetts constitutions.

Can LCP Ever be Terminated?

An individual may petition the parole board to terminate lifetime parole after 15 years.

Issues To Consider In Challenging The Imposition Of Lifetime Parole:

Void for Vagueness: The statutory scheme is arguable unconstitutionally vague because

it fails to establish what finding the judge is required to make to determine whether or not to impose LCP, and because the standard of proof provision is ambiguous.

Apprendi/Blakely Violations:
In Apprendi v. New Jersey, 530 U.S. 466, 490 (2000) the Supreme Court held that, "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt. In Blakely v. United States, __ U.S. __, 124 S.Ct. 2531 (2004), the Supreme Court held that the relevant statutory maximum for Apprendi purposes is the maximum a judge may impose based solely on the facts reflected in the jury verdict or admitted by the defendant.

Although there are no appellate decisions on this issue, arguably the LCP scheme violates Apprendi and Blakely where the statutory maximum for the convicted offense is less than life in prison. For any lesser maximum penalty, a sentence to LCP could conceivably result in a sentence in excess of the statutory maximum, because the defendant's original sentence is increased for every violation committed after the defendant has completed serving his initial sentence. Moreover, at least where the imposition of LCP is discretionary, the increase in the defendant's sentence is as a result of factfinding made by a judge, rather than a jury.

For example, the maximum penalty for indecent assault and battery on a child is 10 years in state prison. If a defendant is sentenced to 9-10 years plus LCP, serves the entire 10 years, is released and then violates LCP, his original sentence will be increased to 9-10 years and 30 days, or 30 days over the maximum statutory sentence.

Mandatory Imposition for Second or Subsequent Conviction: If the court is imposing lifetime parole as a result of a conviction for a second and subsequent sex offense, was the second and subsequent offense alleged in the complaint or indictment? See Commonwealth v. Fernandes, 430 Mass. 517 (1999) (indictment for repeat offender drug offense which carries minimum mandatory penalty must set forth prior convictions with particularity); Commonwealth v. Bynum, 429 Mass. 705 (1999); Commonwealth v. Brusgulis, 403 Mass. 1010 (1989). See also G.L. c.278, §11A (second and subsequent offenses for habitual offender must be alleged and proven).

SEE ATTACHED SAMPLE OPPOSITION MOTION (by John Osler, Esq., CPCS Cambridge)

COMMONWEALTH

V.

XXXXXXXXXXXXXXX

DEFENDANT'S OPPOSITION TO LIFETIME COMMUNITY PAROLE AND REQUEST FOR HEARING

The defendant hereby objects to the imposition of "community parole supervision for life" as set forth in G.L. c. 127, §133C, and authorized by G.L. c. 265, §45 & c. 275, §18. In the alternative, the defendant requests a hearing and asks the Court to determine that he should not receive community parole supervision for life.

As grounds of his objection, the defendant asserts that the statutory provision for lifetime community parole violates substantive and procedural due process under the state and federal constitutions, double jeopardy protections of the federal constitution and state common law, and the separation of powers mandated by the Massachusetts constitution.

(1) The statutory scheme violates due process under amend. XIV, cl. 2, U.S. Const. and art. 12, Mass. Decl. of Rights, in that:

(a) The statute is unconstitutionally vague because it fails to identify the criteria for imposition of lifetime community parole and thus "fails to give a person of ordinary intelligence fair notice." Commonwealth v. Kwiatkowski, 418 Mass. 543, 547 (1994), City of Chicago v. Morales, 527 U.S. 41 (1999);

(b) The statute violates the requirement of due process that "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." Apprendi v. New Jersey, 530 U.S. 466, 488-92 (2000);

(i) The statute violates due process by failing to require proof beyond a reasonable doubt where the potential is for indefinite confinement, albeit one year at a time. See, e.g., Andrews, petitioner, 368 Mass. 468, 489 (1975) (proof beyond a reasonable doubt necessary to commit as sexually dangerous); Superintendent of Worcester State Hospital v. Hagberg, 374 Mass. 271, 275-277 (1978) (requiring proof beyond reasonable doubt for indefinite civil commitments);

(c) By subjecting him to a lifetime of imprisonment, one year at a time (G.L. c. 127, §133C), the statute infringes the defendant's fundamental right to physical liberty, Aime v. Commonwealth, 414 Mass. 667, 677 (1993) ("[f]reedom from government restraint lies at the heart of our system of government and is undoubtedly a fundamental right"), without requiring the government to prove, at any time — not when the "sentence" is imposed pursuant to G.L c. 275, §18, and not when the "parole" is revoked, under G.L. c. 127, §133C — that he is dangerous to anyone. Thus, this infringement on physical liberty violates substantive due process because it is not narrowly tailored to serve a compelling government interest. Aime v. Commonwealth, supra.

(2) The community parole provisions violate the separation of judicial and executive powers mandated by Mass. Const., Pt. I, art. XXX, in two distinct ways.

(a) By giving the parole board unfettered discretion to set and enforce terms and conditions on individuals who have not been sentenced—or who have completed serving any sentence imposed—by the Court, the statutory scheme delegates discretionary sentencing authority to an agency of the executive branch. In all other cases, individuals subject to the jurisdiction of the parole board are serving sentences of imprisionment imposed by the Court, and the parole board's jurisdiction over them is terminated by completion of the sentence. G.L. c. 127, §130 ("[a] prisoner to whom a parole permit is granted . . . shall remain . . . subject to the jurisdiction of such board until the expiration of the term of imprisonment to which he has been sentenced…"). The board's power to set terms and conditions for the conditional liberty of parolees is no different than the prison's authority to govern the conduct of prisoners—it is part of the statutorily prescribed means of executing sentences of imprisonment. Even in the case of individuals "sentenced" to probation, only the Court, not the probation department, has the power to set the terms and conditions which restrict the individual's liberty. Commonwealth v. MacDonald, 435 Mass. 21005 (2001). Lifetime community parole is the only example in Massachusetts law of the liberty of non-prisoners being turned over to the discretion of an administrative agency.

(b) By empowering the prosecutor, in the final paragraph of G.L. c. 265, §18, to decide whether lifetime community parole will be within the range of penalties that the court may impose on first offenders, the statute unconstitutionally vests discretionary sentencing authority in an agency of the executive branch of government. It is important to note that the prosecutor's power to control the sentencing options here is not merely a product of "[p]rosecutors hav[ing] wide ranges of discretion in deciding whether to bring criminal charges and in deciding what specific charges to bring," Cedeno v. Commonwealth, 404 Mass. 190, 196-197 (1999). This statute calls for the prosecutor's exercise of discretion after rather than before the filing of a criminal charge. See, People v. Chacon, Cal.Ct.App., No. F038393, decided 6/26/03 (separation of powers violated by statute requiring judge to obtain prosecutor's consent to sentence defendant as juvenile).

(3) Because the period of parole supervision begins only after the expiration of any sentence of imprisonment or probation imposed by the Court, revocation of parole is a punishment separate and distinct from the sentence imposed by the Court and constitutes a second punishment for the same offense. U.S.Const. amends. V & XIV, art. 12, Mass. Decl. Rights. See also, Opinion of the Justices, 423 Mass. 1201, 1218 n.13, (1996) ("we have always construed the common law protection to be coextensive with that of the Federal Constitution").

In the alternative, the defendant requests that this Court conduct a hearing pursuant to G.L. c. 275, §18, and determine that he should not receive lifetime community parole. For the purposes of such hearing, the defendant asks the Court to rule that G.L. c. 275, §18, places the burden of proof on the Commonwealth to establish the need for lifetime community parole by clear and convincing evidence. The statute is ambiguous as to assignment of the burden of proof. It both declares that a decision to impose lifetime community parole must be supported by clear and convincing evidence and makes reference to not imposing the punishment when it is shown by clear and convincing evidence that no reasons exists to impose it. Compare, "A finding by the court that such person shall be committed to community parole supervision for life shall be supported by clear and convincing evidence" with, "If the judge finds, by clear

and convincing evidence, that no reasons for community parole supervision for life to be served under the jurisdiction of the parole board, as set forth in section 133D of chapter 127, exist, the judge shall not impose community supervision of life on such first offender." G.L. c. 265, § 18, 2 & 4. This ambiguity was recognized by the Supreme Judicial Court in Commonwealth v. Renderos, 440 Mass. 422, 432 n.10 (2003).

As a penal statute, G.L. c. 275, §18, must be construed strictly in accordance with its terms. See Commonwealth v. Chavis, 415 Mass. 703, 708 (1993), and cases cited. Where statutory language "can plausibly be found to be ambiguous," the rule of lenity requires the defendant be given "the benefit of the mbiguity." Commonwealth v. Roucoulet, 413 Mass. 647, 652 (1992). See also, Commonwealth v. Carrion, 431 Mass. 44, 45-46 (2000). Thus, ordinary rules of statutory construction require that the statute be interpreted to place the burden on the government to establish the need for lifetime community parole by clear and convincing evidence.

[DEFENDANT]
By his attorney:

FRESH COMPLAINT UPDATE

Jane White, Esq., CPCS Appeals Unit

In January, 2005, the justices of the Supreme Judicial Court solicited amicus briefs in the case of Commonwealth v. King, No. 09417, on the question of whether Massachusetts should limit fresh complaint testimony to the fact of the complaint and allow no details to be testified to, or whether fresh complaint doctrine should be eliminated in favor of existing rules of spontaneous utterances and prior consistent statements. The case was argued on April 6, and is under advisement.

Several amicus briefs were filed; at least three took a tack decidedly adverse to those accused of crime. One was filed on behalf of the Massachusetts District Attorneys Association, and two others were of the tenor that no person who claims to have been sexually assaulted is either lying about it or mistaken in any particular. The general position of one of these is that the law should be modified to do away with any requirement of "freshness" and to make the out-of-court statements admissible substantively and not just as corroboration.

CPCS filed an amicus brief, which took the position (1) that the Commonwealth be required, during a voir dire, to justify under the regular rules of evidentiary relevance and hearsay prohibitions the admissibility of the purported fact of a complainant's prior consistent statement; (2) that in the alternative the Commonwealth be allowed to introduce only the fact and timing of the complaint's initial accusation; (3) that a radically altered and legally correct limiting instruction be adopted concerning the probative worth of "fresh complaint" evidence; (4) that in no event are the details of complaint admissible absent a showing that such "details" have the capacity in logic to rehabilitate whatever impeachment of the complainant has occurred at trial; and (5) that in no event are multiple instances of "fresh complaint" admissible absent a particularized showing of relevance. The following are some points made in the brief filed on behalf of CPCS as amicus.

Prior consistent statements are not generally admissible. While every juror and citizen probably understands that an accused is put to trial only because someone, months or years before the actual trial, has accused the defendant of committing the crime for which he is being tried, it is only when a defendant is accused of sexual assault that the jury is invited to infer that the accuser is truthful simply because s/he made the accusation. The jury is specifically told that the mere fact of an out-of-court complaint may be used by the jury to "corroborate" the accusation — in plain terms, as evidence that the complainant's claim is credible ("confirmed", "strengthened") simply because s/he made the allegation before coming to court. See Superior Court Criminal Practice Jury Instructions, §4.24, internally inconsistent for directing both that a "fresh complaint" "confirm[s] or support[s] the credibility of the complainant's testimony," i.e., confirming that a sexual assault did indeed occur, and paragraphs later, forbidding use of the out-of-court statement as "evidence that a sexual assault occurred."

The 13th century rationale for the admissibility of "fresh complaint" was the rule of "hue and cry." It "required victims of rape and other violent crimes to alert the community immediately following the commission of the crime. Under this ancient rule, a victim's extrajudicial 'complaint' was a necessary element of, and therefore admissible as part of, the prosecution's case-in-chief." People v. Brown, 8 Cal. 4th 746, 755 (Cal. Supreme Ct. 1994). The rationale for admitting a sexual assault complainant's prior consistent statements even now is that mean-spirited skeptics in the jury box will presume that the complainant made NO complaint fairly immediately and will discount her claims at trial for this invented reason. So an instruction tailored to the only claimed probative worth of purportedly "fresh" complaint now should be: "A fresh complaint does **not** bolster the complainant's credibility or prove the underlying truth of the sexual assault charges **but instead merely dispels the inference that the complainant was silent."** Note that this is both clear and avoids the opposing directives within the Superior Court "model" rule.

A primer on the admissibility of "prior consistent statements" may be useful, particularly since some appellate decisions have been flatly wrong in applying the relevant law. A prior consistent statement, generally, is inadmissible because it is hearsay. Exceptions to the rule prohibiting introduction of prior consistent statements occur when the prior statements may fairly be said to rebut an otherwise available inference, posited by the opponent of the declarant, of false trial testimony by the declarant. Prior consistent statements, however, have no rational capacity to rebut a claim of falsehood unless they were made "before the intervention of a pernicious impulse" to lie. Although a witness who is impeached at trial by a prior inconsistent statement "must be permitted to explain the prior statement and the reason for any omission or inconsistency," Commonwealth v. Darden, 5 Mass. App. Ct. 522, 527-528 (1977), **the mere introduction of a prior inconsistent statement does not justify introduction of a prior "consistent" statement.** Evidence of prior inconsistent statements is offered, "not for the purpose of proving the truth of such previous statements, but to show that [the witness] [is] unworthy of belief, inasmuch as he ha[s] given two inconsistent statements of the same transaction, one of which [is] necessarily untrue. … It d[oes] not relieve the difficulty, or in any degree corroborate the last story told by the witness, to show that previously he had made similar statements of the transaction. The discredit arising from the fact that he ha[s] made contradictory statements remain[s] untouched. The contradiction [is] not disproved by such evidence [.]" Commonwealth v. Jenkins, 10 Gray 485, 488 (1858).
See, e.g., Commonwealth v Gaudette, 441 Mass. 762, 769 (2004) (because cross-examination of witness did not suggest that witness's trial testimony was of **recent** contrivance, no pretrial statement of witness was admissible, unless it was one inconsistent with her trial testimony, and thus admissible as impeachment); Commonwealth v. Binienda, 20 Mass. App. Ct. 756, 759 (1985) (complainant's motive to falsify details of robbery arose when he discovered that his money was missing; prior "consistent" statement at issue was thus "made after and not before the alleged motive to falsify testimony came into existence", so not admissible). Cross-examination and impeachment generally, and introduction of prior inconsistent statements generally, "do[ ] not justify a conclusion that a claim of recent contrivance is inherent in the circumstances." Commonwealth v. Zukoski, 370 Mass. 23, 27 (1976). "In a certain sense it is always true that every previous statement of a witness inconsistent with the one made by him at trial has or may have a tendency to show that the latter is a matter of recent contrivance. It is certainly a recent statement and may be recently contrived. [But] [i]f the exception to the rule is to be so broad as to permit in every such case the introduction of previous consistent statements to prop up the credibility of the witness, the exception would very soon abolish the general rule." Commonwealth v. Tucker, 189 Mass. 457, 484 (1905).

"Fresh complaint" law in this Commonwealth to date has set in place, regardless of the actual issues or evidence in a given case, irrebuttable presumptions: (1) that the accuser will be thought to have been "silent" about the crime at some earlier important point, (2) that such "silence" will be thought by the jury to have been an "inconsistent" statement which will inure to the unfair benefit of the defendant, (3) that any pernicious impulse to lie will be deemed to have occurred only in the time between the first complaint and the time of trial (such that the content of the prior consistent statement therefore logically "rebuts" the imaginary claim that the motivation of the complainant to lie came sometime after, rather than before, this initial complaint), and (4) that the complainant's veracity must thus be bolstered by allowing the invented "inconsistency" to be rebutted by an invented rehabilitative "consistency" in the guise of a "fresh" complaint which the Court is necessarily deeming, as a matter of law, to have been made before there was any reason to lie. If normal evidentiary law is instead applied, no purported "fresh complaint" could be admissible unless it meets the foundational requirements for introduction as a spontaneous utterance, because otherwise there will have been enough opportunity to have reflected and made a false allegation of rape — false either because no sexual activity occurred or because sexual activity was consensual.

CASE NOTES

This section of the Training Bulletin contains a list of every Supreme Judicial Court and Appeals Court opinion concerning criminal law that was handed down in March and April of 2005. Following each citation is a list of key words relating to all of the issues discussed in that particular opinion. These key words do not necessarily correspond precisely with the keywords listed in the opinion's headnotes. In addition, this section contains a brief discussion of the issues in these cases, but not of every opinion and not of every issue in a particular opinion. We have selected only those cases and only those issues within those cases which appear to be of some significance. Where appropriate, we have also included criticism, analysis, and/or practice tips.

Commonwealth v. Prophete, 443 Mass. 548 (2005): search incident to arrest, strip search, scope

Commonwealth v. Poissant, 443 Mass. 558 (2005): sexually dangerous person, qualified examiners, expert, expert testimony, probable cause, legislative intent, delay

Commonwealth v. Dew, 443 Mass. 620 (2005): murder, search warrant, scope, overbroad, access, control, similar crime, third-party perpetrator evidence, discovery, grand jury testimony, grand jury minutes, impoundment, redactions, prior bad acts, statement against penal interest, corroboration, closing argument

Commonwealth v. Adjutant, 443 Mass. 649 (2005): voluntary manslaughter, self-defense, character evidence, propensity, state of mind, first aggressor, probative value, discretion, reputation evidence, specific acts, notice, rebuttal

Commonwealth v. Delacruz, 443 Mass. 692 (2005): closing argument, transcript

Commonwealth v. Rodriguez, 443 Mass. 707 (2005): no-knock warrant, motion for new trial, collateral estoppel, issue preclusion, direct estoppel (no write-up)

Commonwealth v. Harris, 443 Mass. 714 (2005): impeach, prior conviction, common nightwalker, rape-shield, prejudice, limiting instruction, reputation evidence, specific acts, bias, motive to lie, closing argument

Commonwealth v. Farley, 443 Mass. 740 (2005): murder, first degree, deliberate premeditation, jury instruction, third-party perpetrator, cross-examination, confrontation, privilege, self-incrimination, extrinsic evidence, prior inconsistent statement, collateral

Commonwealth v. Charros, 443 Mass. 752 (2005): search warrant, required finding of not guilty, joint venture, no-knock, probable cause, arrest, disclosure, confidential informant, statement against penal interest, unavailable, corroboration, ineffective assistance of counsel

Commonwealth v. Lao, 443 Mass. 770 (2005): murder, first degree, deliberate premeditation, individual voir dire, domestic violence, required finding of not guilty, motive, circumstantial evidence

Commonwealth v. Delvalle, 443 Mass. 782 (2005): murder, first degree, deliberate premeditation, extreme atrocity or cruelty, ineffective assistance of counsel, DNA, prior bad acts, motive, intent, voluntary intoxication, prosecutorial misconduct, sympathy, improper inference, reasonable doubt, jury instruction

Commonwealth v. Gonzalez, 443 Mass. 799 (2005): murder, first degree, extreme atrocity or cruelty, reenactment, hearsay, adoptive admission, communicative statement, prior bad acts, character evidence, joint venture, principal, involuntary manslaughter, voluntary manslaughter, ineffective assistance of counsel, expert testimony, occult blood

Commonwealth v. Garcia, 443 Mass. 824 (2005): murder, first degree, deliberate premeditation, statements, custodial, Miranda, knowing, intelligent, voluntary, motive, limiting instruction, gang, voluntary manslaughter, heat of passion, malice, dangerous weapon, intent to kill

Commonwealth v. McCoy, 443 Mass. 1015 (2005): records, privilege (no write-up)

Hartfield v. Commonwealth, 443 Mass. 1022 (2005): murder, second degree, required finding of not guilty, reasonable provocation, excessive force, self-defense, mitigating circumstances (no write-up)

Commonwealth v. Chapman, 444 Mass. 15 (2005): sexually dangerous person, fundamental fairness, due process, collateral estoppel

Commonwealth v. Azar, 444 Mass. 72 (2005): murder, manslaughter, sentence, suspended sentence, statutory good time, illegal sentence

Commonwealth v. Welch, 444 Mass. 80 (2005): harassment, hateful words, conduct, acts, speech, stalking, pattern, series, ex post facto, free speech, First Amendment, fighting words, true threats, savings clause

Commonwealth v. Robinson, 444 Mass. 102 (2005): harassment, substantial emotional distress, jury instructions, required finding of not guilty, intimidation of a witness

In re Jansen, 444 Mass. 112 (2005): buccal swab, DNA, chain of custody, private citizen, summons, objects, discovery, relevance, evidentiary value, search, seizure, state action

Commonwealth v. Perez, 444 Mass. 143 (2005): murder, first degree, deliberate premeditation, extreme atrocity or cruelty, consciousness of guilt, cross-examination, closing argument, jury instructions, malice, dangerous weapon, unanimous verdict, Cuneen factors

Commonwealth v. Davis, 63 Mass. App. Ct. 88 (2005): investigatory stop, motor vehicle, intoxication, anonymous tip

Commonwealth v. Cavanaugh, 63 Mass. App. Ct. 111 (2005): school zone, possession with intent, opinion, expert, personal use

Commonwealth v. Wilcox, 63 Mass. App. Ct. 131 (2005): probation, violation, no contact, touching, communication, hearsay, police report, reliability, trustworthiness, good cause, videotape, knowledge, consent, written findings, probation fee

Commonwealth v. Kendrick, 63 Mass. App. Ct. 142 (2005): probation, violation, no contact, touching, communication

Commonwealth v. Bonds, 63 Mass. App. Ct. 163 (2005): rape, consent, character evidence, propensity, collateral, undue sympathy, credibility

Commonwealth v. San, 63 Mass. App. Ct. 189 (2005): investigatory stop, exit order, frisk, protective sweep, reasonable suspicion, nighttime, home invasion, reasonable apprehension of danger

Commonwealth v. Lugo, 63 Mass. App. Ct. 204 (2005): required finding of not guilty, burning a dwelling, motive, opportunity, expert testimony, ultimate issue (no write-up)

Commonwealth v. Hardy, 63 Mass. App. Ct. 210 (2005): search warrant, nexus, probable cause

Commonwealth v. Paton, 63 Mass. App. Ct. 215 (2005): harassment, required finding of not guilty, stalking, willful, accidental, malicious, substantial emotional distress

Commonwealth v. Mullane, 63 Mass. App. Ct. 317 (2005): keeping premises, unlawful sexual intercourse, house of ill fame, prior bad acts, common scheme, probative value, prejudice, hearsay, prostitutes, jury instructions

Commonwealth v. Kneram, 63 Mass. App. Ct. 371 (2005): whoever, furnishing alcohol, plain language, ambiguous, legislative intent

Ready, 63 Mass. App. Ct. 171 (2005): sexually dangerous person, Abel Assessionment for Sexual Interest test, general acceptance, scientific community, peer review, error rate, relevance, jury trial, waiver

Commonwealth v. Prophete, 443 Mass. 548 (2005)

After seeing the defendant (passenger) and co-defendant (driver) smoking what appeared by look and smell to be a joint, police officers ordered the driver to pull over, but he ignored the order, running a red light, until the officers overtook and stopped the car. Both men were placed in handcuffs, and after the co-defendant denied possessing any further contraband, a subsequent search of him revealed a bag in his waistband which contained one bag of marijuana and nine small bags of cocaine, as well as a cell phone, pager, and cash. A pat-down of the defendant, who had given the police a driver's license which they knew to be in the name of another individual, uncovered a cell phone, pager, and cash, but no contraband. While doing this pat-down, the defendant used his hands to protect the area around his groin from the officers' frisk. They thus called in the windowless transport van, placed the defendant inside, and ordered him to remove one article of clothing at a time, until the removal of his pants—but not yet his underpants—resulted in a bag containing marijuana and cocaine falling to the floor. **The SJC stated, "the facts known to the officers at the time they requested, and received, authorization to conduct a strip search of the defendant, were sufficient to justify their intention to conduct such a search." However, the Court then went on to define a strip search as "one in which a detainee is commanded to remove the last layer of his or her clothing" and concluded that the search of the defendant here did not ultimately constitute a strip search because he still had his underwear on when the drugs were uncovered. The Court held that , in the circumstances of this case, this particular search was within the permissible scope of a search incident to arrest**

Commonwealth v. Poissant, 443 Mass. 558 (2005)

The SJC first held that a defendant in a sexually dangerous person proceeding "need not submit to an examination by an expert selected by the district attorney." Further, the Court held that "a defendant's refusal to participate in such an examination may not result in the barring of expert testimony presented in his defense at trial." Here, after a judge found probable cause to believe the defendant met the definition for a sexually dangerous person, two qualified examiners (QEs) submitted reports which concluded he did not meet that statutory definition. Nonetheless, the Commonwealth petitioned for trial and then unsuccessfully moved for an order that the defendant submit to an interview with another expert proposed by the Commonwealth. The SJC noted that the language of G.L. c. 123A does not authorize any examinations of the Defendant by Commonwealth experts, beyond the two QEs, and a review of the entire statutory framework "supports our conclusion that the Legislature did not intend to require the defendant to submit to examination by anyone other than the two qualified examiners." Rejecting the Commonwealth's argument that because the QEs are not advocates for the government's position and because the defendant may retain his own expert, the Commonwealth is somehow disadvantaged, the SJC noted that this is not "a typical advocacy proceeding" as the government is seeking to incarcerate the defendant beyond the length of his sentence. The SJC further noted that, contrary to the government's argument, the rule of Blaisdell v. Commonwealth, 372 Mass. 753 (1977)—requiring a defendant to submit to a psychiatric examination by a Commonwealth expert when the defendant intends to raise his mental state through his own expert testimony at trial—does not apply because it is the Commonwealth, through its commitment petition, not the defendant, who has placed the Defendant's mental state at issue in these proceedings.

In a footnote (fn 3), the Court terms the five-month delay between the probable cause hearing and the hearing judge's finding of probable cause "inexcusable" "absent extraordinary circumstances."

Commonwealth v. Dew, 443 Mass. 620 (2005)

In a murder prosecution, the SJC affirmed the denial of a motion to suppress ballistics evidence found, pursuant to a search warrant, in a third-floor apartment of a triple-decker home, even though the police knew the defendant's learner's permit showed he lived in the first-floor apartment. "What is apparent from the affidavit is that, through 'reasonable investigation,' the police determined that Dew had access to all the units at 51 Stanwood Street and 'that the defendant had sufficient access and control over the entire structure so as to warrant a finding of probable cause 'to search' the entire building.'" The SJC upheld the trial judge's refusal

to permit the defendant to introduce purported third-party perpetrator evidence. Two days before the defendant allegedly shot the victim at a particular rooming house in a drug deal/robbery, another victim was shot and killed at that rooming house in a situation also involving drugs. The trial judge precluded the defendant from offering any evidence about this prior murder. The SJC concluded that "to offer evidence of another similar crime, a defendant must also 'provide [a] basis for a conclusion that [he] was not the perpetrator of that crime," something the defendant here failed to do. **The SJC further rejected the defendant's claim that his inability to show that he was not the perpetrator of the earlier murder was related to his inability to obtain discovery of the grand jury testimony relating to that earlier murder, finding the trial court judge within her discretion in concluding that the grand jury testimony was irrelevant and disclosure of that testimony could have jeopardized the investigation into that murder.**

The SJC affirmed the trial judge's refusal to allow the defendant to testify that he was a drug user only who previously bought drugs from one of the witnesses against him, holding that this was prior bad acts evidence which was cumulative of the witness' own testimony and did not support the defense theory that this witness had a motive to frame the defendant.

The SJC also affirmed the trial judge's refusal to allow the defendant to call a witness to testify that the defendant's cousin admitted to her that he committed the murder, noting that the defendant failed to meet the foundational requirement for statements against penal interest that, when offered to exculpate the accused, such statement must be corroborated by circumstances indicating its trustworthiness.

The SJC finally approved of the prosecutor's closing argument, in which he referred to the defendant as a "gun-carrying crack dealer," noting that this characterization was both supported by the evidence and relevant to the reliability of the witness identifications.

Commonwealth v. Adjutant, 443 Mass. 649 (2005)

The SJC reversed the defendant's voluntary manslaughter conviction because the trial judge erred when she ruled she lacked the discretion, in a self-defense case, to admit evidence of prior violent acts committed by the alleged victim which were unknown to the defendant at the time of the altercation. In so ruling, the SJC announced the following new rule of evidence: in a self-defense case, "where the identity of the first aggressor is in dispute and the victim has a history of violence, . . . the trial judge has the discretion to admit evidence of specific acts of prior violent conduct that the victim is reasonably alleged to have initiated" regardless of whether the defendant was aware of those instances of violence. The SJC first noted that current Massachusetts case law permits the introduction of evidence of the AV's violent past if known to the defendant on the issue of whether the defendant acted reasonably in self-defense in light of that knowledge. However, the Court then noted that Massachusetts appellate courts have never settled the issue of the admissibility of the AV's violent past, when unknown to the defendant, to prove the AV's propensity to initiate a violent assault. The Court then went on to acknowledge that in federal court and in forty-five states some form of such evidence is admissible on the question of who was the first aggressor—the AV or the defendant.

After acknowledging the significantly probative value of such evidence on this issue, the Court went on to resolve in what form such evidence should be admitted. **The SJC concluded that evidence of specific acts of violence by the AV should be admissible, in the trial judge's discretion, while reputation evidence of the AV's violent character should not be admissible to show the AV's propensity to initiate violence.** The Court made this distinction on the rationale that evidence of specific acts of violence initiated by the victim are more reliable and probative than reputation evidence and better allow trial judges to weigh the probative value against the potential for prejudice in a specific case.

The Court also established several ground rules governing the introduction of this type of evidence: (1) a defendant intending to introduce evidence of prior violent conduct by the AV must provide the

Commonwealth and court with sufficient pretrial notice to allow the Commonwealth to investigate and prepare a rebuttal; (2) if the Commonwealth does intend to offer rebuttal evidence, it must similarly provide pretrial notice to the defendant and the court; and (3) when such evidence is introduced at trial, the trial judge should instruct the jury on the precise purpose for which it is offered.

Finally, the SJC announced that because the defendant in this case preserved the issue and argued for the new rule of evidence on appeal, "she should have the benefit of this decision" but "[o]therwise, it shall apply only prospectively."

Commonwealth v. Delacruz, 443 Mass. 692 (2005)

When it's available, a transcript of trial testimony may be read verbatim to the jury during closing argument, so long as opposing counsel has been provided a copy of the transcript. The attorney wishing to read the transcript need not make any particular proffer or involve the judge prior to argument, absent an objection.

Commonwealth v. Harris, 443 Mass. 714 (2005)

The SJC reversed the majority of the defendant's convictions, including an aggravated rape conviction, because of the combination of two errors: First, the "judge erred in ruling that he had no discretion to admit impeachment evidence that the complaining witness had been convicted as a common nightwalker." "We conclude that it is within the judge's discretion to admit evidence of such convictions pursuant to G.L. c. 233, § 21, but that the exercise of that discretion must take into consideration the objectives of the rape-shield statute." Specifically, the "judge should . . . consider the potential that the jury may misuse the conviction of a sexual offense as indicative of the complaining witness's consent, and the risk that the complaining witness may be subjected to needless humiliation."

Second, the prosecutor improperly exploited the judge's evidentiary ruling excluding the nightwalker conviction by arguing that, contrary to the defense theory, "the absence of any evidence that the complainant engaged in prostitution meant that she was not a prostitute," even though based on the excluded convictions, the prosecutor knew the complainant was a prostitute.

Commonwealth v. Farley, 443 Mass. 740 (2005)

In affirming this first-degree murder conviction, the SJC held that "[t]he judge's instruction to the jury that the 'Commonwealth does not have the burden of proving that no one else may have committed the murder' [was] technically correct." Even though the Commonwealth must prove that the defendant committed the murder, it need not prove that no one else did, where "this is not a case where the murder could only have been committed by either the defendant or a specific alternate suspect" nor was it "a case of 'a classic due of credibility.'" The SJC did call the instruction "unnecessary," just not erroneous.

The SJC further concluded that the trial court's limitation of the defendant's cross-examination of one particular witness did not warrant a new trial. This witness testified at the first trial (which resulted in a conviction later overturned on appeal), but sought to avoid testifying at the second trial by asserting his Fifth Amendment privilege against self-incrimination. At the Commonwealth's request, the trial judge compelled the witness to testify, finding that he had waived his privilege at the first trial, but limited cross-examination to the scope of his testimony at the first trial and permitted the witness to assert the privilege on a question-by-question basis. **Specifically, the SJC held that the trial judge correctly allowed the witness to invoke the privilege when asked about his current employment, a question designed to show that the witness presently dealt drugs. Also, although the SJC held that the trial judge erred in permitting the witness to assert his privilege when asked about his relationship to a particular woman—because the woman purportedly ran drugs for the witness back in 1993, a subject about which the witness testified at the first trial—the error "was harmless beyond a reasonable doubt as the information was subsequently elicited from [the woman] herself."**

Finally, the SJC concluded that the trial judge was within his discretion in excluding extrinsic evidence of a witness's prior inconsistent statement—that the witness, who denied knowing the victim or ever being at her house, had told a defense witness

that he had been at "Sally's" house in the area of Bussey Street—because "the offered impeachment went only to the collateral issue of [the witness's] credibility, and not a main issue in the case."

Commonwealth v. Charros, 443 Mass. 752 (2005)

The SJC held that a search warrant authorizing the search of the defendants' (husband and wife) home did not authorize stopping the defendants one mile away from the home, when the police had watched them leave the home and drive one mile away before stopping them, searching them, and bringing them back to the home while the search there was conducted. However, because the search warrant affidavit detailed that a confidential informant had purchased drugs from the husband-defendant, that information provided the police with probable cause to arrest him, thus justifying his detention. On the other hand, there was no lawful justification for the detention of the wife-defendant, and the SJC thus held that the $821 in cash found in her purse should have been suppressed. Because that money, coupled with the wife-defendant's testimony explaining her possession of that money, provided some of the only evidence tying her to the twenty-eight grams of cocaine found in the apartment, which likely was the basis for her conviction, the SJC reversed her conviction and ordered a new trial.

Commonwealth v. Lao, 443 Mass. 770 (2005)

The SJC "declines to expand the categories of cases for which individual voir dire is mandatory," rejecting the defendant's claim that, where he was accused of murdering his estranged wife, the judge should have asked individually "if any of the prospective jurors, or their relatives or close friends, ever had been in abuse relationship."

The SJC also held that the trial judge properly denied the defendant's motion for a required finding of not guilty, "although the evidence here was whole circumstantial, . . . it was sufficient to warrant the jury's conclusion that the defendant killed [the victim] and that he did so with deliberate premeditation and malice." Specifically, evidence suggesting that the killing took some time, evidence that the defendant possessed a motive to kill his estranged wife, and one witness' testimony that he saw the defendant outside the victim's residence around the time of the murder sufficed to justify the denial of the required finding motion, despite evidence which showed that the defendant was at a Home Depot shortly before the killing and evidence of possible alternative perpetrators.

Commonwealth v. DelValle, 443 Mass. 782 (2005)

In affirming this first degree murder conviction (under both deliberate premeditation and extreme atrocity or cruelty theories), the SJC held that defense counsel was not ineffective for failing to object to the Commonwealth's DNA expert's testimony regarding the probability of a DNA match among ethnic groups to which the defendant did not belong. The Court reasoned that "the lack of reporting on the defendant's own alleged racial subgroup did not render the DNA testimony scientifically unreliable," because the jury knew that the defendant did not belong to the groups discussed, the expert testified that "a given DNA profile in any ethnic group is always rare," and most importantly, the defendant himself admitted that the blood subject to the DNA testing was his own.

The SJC also rejected the defendant's argument that the trial judge, sua sponte, should have engaged in an inquiry as to the reliability of performing DNA testing on seven year old blood stains, noting that defense counsel obtained funds for his own DNA testing and vigorously challenged the accuracy of the Commonwealth's DNA analysis in other respects, as well as the fact that the defendant admitted the blood tested was his.

The SJC concluded that evidence of the defendant's prior bad acts was properly admitted for permissible purposes. Specifically, testimony that the defendant ofted used cocaine in the first-floor apartment of the building where the murder occurred "was relevant to prove the defendant's motive for breaking into [that] apartment on the night of the murder"; testimony that a probation officer armed with a default warrant went with the police to the defendant's home when he was arrested "was relevant to explain the sequence of events that took place on the day the defendant was arrested"; and the defendant's own statement admitting his involvement in other "b and e's" " was relevant

to prove [his] intent and to support his admission that he had broken into the victim's house on the night of the murder."

On the other hand, the Court concluded the trial judge did not err in precluding the defendant from presenting testimony, from his wife, that he had a serious drug problem at the time of the murder, because only testimony that he was actually intoxicated on the night of the murder would have been relevant to the issue of voluntary intoxication.

The Court also rejected the defendant's claim that the prosecutor's elicitation of testimony that the victim's niece was a descendant of slaves and that the victim lived in a close-knit African-American neighborhood constituted an improper appeal to sympathy based on the victim's race, reasoning that the jury was otherwise aware of the victim's race and the judge instructed the jury not to "be swayed by sympathy or prejudice."

Nor did the Court find that the prosector's closing remarks were improper when the prosecutor asked the jury to "think about the victim's life" and how that life would not have prepared her "for the kind of violence, the kind of brutality, the kind of pain, the kind of suffering that the defendant put her through." These comments did not constitute an inappropriate "right to live" argument, but rather "were fair comment on the consciousness and degree of suffering," which is properly considered on the issue of extreme atrocity or cruelty.

The Court did find that the trial court erred in permitting the prosecutor to elicit from the director of the Boston crime lab testimony that "he had an opportunity to sit down with defense counsel and people whom defense counsel had brought with him to the crime laboratory, to examine the blood test reports and exhibits and to discuss his findings." However, while this testimony "may have raised the inference . . . that the defendant had elected not to call his experts . . . because he knew that their testimony would be damaging to him," because of the strength of the Commonwealth's case and the defendant's admission that the blood was his, the error caused no prejudice to the defendant.

Commonwealth v. Gonzalez, 443 Mass. 799 (2005)

In a first degree murder prosecution, the SJC held that the admission of a witness' testimony that she observed coventurers reenact the killing, including the role the defendant played in the killing, was not error. Although the nonverbal reenactment "potentially presents hearsay problems" because it "communicates a message," the testimony of another witness, called by the defendant, "would warrant the jury's finding that the defendant was present during the reenactment," thus rendering it an adoptive admission. In a footnote (fn 6), the Court did reject the Commonwealth's claim that the reenactment was admissible as a statement by a coventurer because the reenactment "did not further a goal of the conspiracy."

The SJC also rejected the defendant's claim that the jury should have been instructed that the Commonwealth bears the burden of disproving involuntary manslaughter; rather, the Commonwealth must only disprove the elements of voluntary manslaughter, where the evidence supports a voluntary manslaughter instruction, which was not the case here.

Commonwealth v. Garcia, 443 Mass. 799 (2005)

In affirming this first degree murder conviction, the SJC upheld the denial of a motion to suppress statements, in which the defendant initially denied involvement in the killing, then when confronted with conflicting information from another individual, blurted out a confession, before being Mirandized and then expanding on that confession. Significantly, the Court said that the pre-Miranda confession should not have been suppressed because the defendant was not then in custody, as he had volunteered to come to the police station, entered through the visitor's entrance, was not physically restrained, and was only briefly questioned and in a conversational manner. The Court noted that although the conflicting information may have made the defendant a suspect in the questioning officer's mind, that factor is not relevant to the issue of custody unless the officer's suspicion is communicated to the defendant, which it was not.

The SJC also rejected the defendant's claim that the jury should have been instructed on voluntary manslaughter based on a heat of passion, concluding that the passage of twelve hours after the defendant's

cousin was stabbed coupled with the defendant's observation that the victim, a complete stranger, was wearing colors suggestive of gang membership did not render the shooting "a sudden, impulsive reaction attributable to the heat of the moment."

Commonwealth v. Chapman, 444 Mass. 15 (2005)

The SJC concluded that principles of collateral estoppel do not preclude the Commonwealth from now petitioning to commit the defendant as a sexually dangerous person, even though he was adjudicated not a sexually dangerous person in 1991. During the course of the defendant's incarceration for sexual offenses, he was found to be a sexually dangerous person and transferred from prison to the Massachusetts Treatment Center ("MTC"). Fourteen years later, he petitioned to be released from the MTC pursuant to c. 123 s. 9 and after an evidentiary hearing, was found no longer to be a sexually dangerous person and thus was transferred back to prison to complete his sentence. Just prior to his scheduled release from prison, the Commonwealth petitioned to have the defendant committed, beyond the period of his sentence, as a sexually dangerous person, but a judge dismissed that petition, concluding that the 1991 adjudication collaterally estopped the Commonwealth from proceeding and, consequently, any finding of sexual dangerousness now would violate due process.
The SJC reversed the motion judge's order of dismissal, holding that although the Commonwealth is barred from relitigating whether the defendant was sexually dangerous in 1991, "neither collateral estoppel nor substantive due process prevents a judge from determining whether probable cause exists to find that [the defendant] (many yeas later) is presently a sexually dangerous person." Because the Commonwealth's petition in the instant case was predicated in part on conduct in which the defendant engaged subsequent to the 1991 adjudication, this petition was permitted to proceed forward.

Commonwealth v. Azar, 442 Mass. 72 (2005)

After being convicted of second-degree murder in 1989 and then successfully challenging that conviction on appeal, the defendant pled guilty to manslaughter. He received a sentence of nineteen to twenty years, with credit for the 4,570 days he had already served for his murder conviction, and the balance of the sentence suspended for ten years. Subsequently, the defendant moved, pursuant to Rule 30(a), to correct an illegal sentence, arguing that "the statutory good time he was due for the period during which he was incarcerated on the murder conviction reduced his sentence to the extent that the period he had already served was greater than the twenty-year maximum sentence for manslaughter." This question became particularly pertinent when, subsequent to the filing of his Rule 30(a) motion, the defendant was found in violation of his probation based on new criminal charges. **The SJC held that the balance of the suspended sentence on the manslaughter conviction could still be imposed because the defendant was not entitled to any statutory good time while he was serving a sentence on a murder conviction, even though that conviction was later overturned and the defendant pled guilty to the lesser charge of manslaughter, and he does not receive any statutory good time for the suspended sentence which he has been serving since his manslaughter plea.**

Commonwealth v. Welch, 444 Mass. 80 (2005)

In construing the criminal harassment statute, c. 265, § 43A, the Court first concluded that "hateful words" may constitute the harassing "conduct" or "acts" proscribed by this statute. The Court reached this conclusion because (a) one sentence of the statute itself provides a non-exhaustive list of covered conduct including some communicative acts; (b) prior case law held that the related stalking statute, c. 265, § 43, may prohibit speech, and the harassment statute was intended to criminalize the same type of conduct as the stalking statute when no threat is made; (c) verbal conduct may constitute "harassment" under civil sexual harassment law; and (d) other jurisdictions have so construed similar statutes.

The Court then determined that to offend the statute, which prohibits engaging in a "pattern" or "series" of harassing conduct or acts, one must engage in three or more such incidents. This numerical requirement flowed from both the dictionary definition of "series" and the Court's own similar interpretation of the stalking statute. **In a footnote (fn 12), the Court stated that "prestatutory incidents may be considered in determining whether poststatutory incidents meet the statutory elements**

of harassing conducts or acts" and "may be admitted to show intent or motive."

Next the Court noted that the requirement that the conduct be "directed at a specific person" means that the defendant must have "intended to target the victim" on at least three occasions.

Finally, the Court held that under both state and federal constitutional protections against ex post facto laws, none of the three or more incidents could have occurred prior to the effective date of the statute, October 30, 2000.

Thus, the SJC reversed this criminal harassment conviction because three of the seven allegedly harassing incidents occurred prior to the effective date of the statute and two of the remaining four incidents were not "directed at" the defendant (one where the defendant made derogatory comments about the alleged victim and his sexual orientation "in a normal tone" to a third party outside the alleged victim's apartment building; the other where the defendant yelled similar remarks inside the defendant's own apartment.). Only two incidents remained, less than the three required by the statute.

Although unnecessary to resolve this particular case, the SJC went on to uphold the constitutionality of the statute against a First Amendment attack because "it appears intended to reach primarily what would be considered "fighting words," a category of speech unprotected by the First Amendment.

Commonwealth v. Robinson, 444 Mass. 102 (2005)

Although the SJC found that the trial court judge erroneously defined the term "substantial" as it applies to one element of the criminal harassment statute - that the offending conduct "would cause a reasonable person to suffer substantial emotional distress," The Court concluded this unobjected to error did not create a susbstantial risk of a miscarriage of justice because the defense theory was that the incidents at issue simply did not occur. The trial judge defined "substantial" as "more than trifling or passing emotional distress," and the Court worried that the jury could have interpreted this as meaning "that anything even slightly more than trifling or passing emotional distress would qualify as substantial," which contradicts common dictionary definitions of "substantial" ("considerable in amount, value, or worth,") and other case law ("something markedly greater than the leve of uneasiness, nervousness, unhappiness or the like which are commonly experienced in day to day living"; "a serious invasion of the victim's mental tranquility"). The Court suggested trial judges look to these definitions in the future.

In re Jansen, 444 Mass. 112(2005)

The SJC affirmed a trial court's order to an uncharged, possible third-party perpetrator (Jansen) that he submit to a buccal swab for DNA testing. The Court found the trial court's authority for this order both in the defendant's Article 12 right "to produce all proofs that may be favorable to him" and in Rule 17(a)(2)'s language that the court "may command the person to whom [a summons] is directed to produce . . . other objects designated therein," because saliva constitutes an "object" and the defendant had made the requisite showing that "Jansen's DNA has significant relevance and evidentiary value to [the] defense." The Court also rejected Jansen and the Commonwealth's arguments that the order violates his constitutional right to be free from unreasonable searches and seizures, because the order was initiated by a criminal defendant and thus, there was insufficient state action to trigger this constitutional right.

Commonwealth v. Perez, 444 Mass. 143 (2005)

Affirming this first degree murder conviction, the SJC concludes the trial judge did not err in permitting a witness to testify that the defendant assaulted that witness at the jail two months prior to trial and later told that witness "if [he] be cool, [the defendant would] be cool," because such evidence was admissible as consciousness of guilt.

Nor did the Court find the trial judge improperly limited cross-examination of the lead detective by precluding defense counsel from asking the detective if he received information about the victims' "involvement with some individuals in Providence." The Court reasoned that defense counsel was allowed to extensively cross-examine the detective

on inadequacies in the investigation and that this line of questioning would have opened the door to the detective's explanation as to why he did not pursue information that the victims stole drugs from people in Providence, since such explanations involved "speculative, collateral, and potentially prejudicial subject matter," including rumors that the people in Providence had hired the defendant as an assassin.

The Court did find that the prosecutor twice misstated evidence in closing argument, but concluded these errors did not warrant reversal. First, the prosecutor argued that a witness testified the defendant told that witness he had chased one of the victims down before shooting him in the head. Although the evidence lent itself to an inference that the defendant had in fact chased the victim down before shooting him, that was not the witness' testimony. Although defense counsel objected, the judge did not specifically correct the error in jury instructions, and the issue of whether the defendant chased the victim down was not collateral, the Court resolved that the error "would not have affected the jury's conclusions," because the actual testimony, coupled with the forensic evidence, suggested that the defendant shot the victim once in the back and once in the head as the victim ran from a car, and then after the victim fell to the ground, shot him repeatedly in the back. Similarly, the prosecutor's misstatement that a witness said the defendant stated he "had to kill [the victims] before they killed" him did not require reversal because that misstatement "was limited to the collateral issue of motive," "was arguably less prejudicial . . . than [the] actual testimony," and "could not possibly have made a difference in the jury's conclusions.

The SJC further held the trial judge correctly charged that the jury could infer malice from the intentional use of a dangerous weapon, even in connection with first prong (intent to kill) malice.

Finally, the SJC again rejected the argument that in light of recent Supreme Court cases (Booker, Blakely, Ring, Apprendi, Richardson), the jury must be instructed that they must reach a unanimous verdict with respect to any particular Cuneen factor used to support a first degree murder conviction for extreme atrocity or cruelty. "[T]he Cuneen factors .are neither elements of the crime nor separate theories of culpability, but 'evidentiary considerations' that guide a jury in determining whether a murder was committed with extreme atrocity or cruelty." The Court went on to discuss how none of the cited Supreme Court cases governed the court's handling of the Cuneen factors.

<u>Commonwealth v. Davis</u>, 63 Mass. App. Ct. 88 (2005)

The Appeals Court concluded that an anonymous tip that a woman driving a specifically-described SUV had stumbled around and then thrown beer cans out the SUV's window before driving off justified an investigatory stop of the vehicle.

<u>Commonwealth v. Cavanaugh</u>, 63 Mass. App. Ct. 111 (2005)

The Appeals Court first holds that the Commonwealth sufficiently proved a school zone violation through a police officer's testimony that the defendant drove past a location which was measured to be within one thousand feet of a school and then was stopped at a different location and discovered to possess five bundles (50 bags) of heroin. The Commonwealth initially attempted to prove the school zone charge by having the officer testify to mathematical calculations he made to determine that a different location, where the defendant's car was initially parked when the officer saw the defendant engage in what he believed to be a drug deal, was within one thousand feet of the school. After first allowing the jury to hear this testimony, the trial judge then struck it because the Commonwealth failed to lay a sufficient foundation for the mathematical formula employed by the police officer. Nonetheless, the judge permitted the Commonwealth to shift its theory and argue that the location past which the defendant drove was within the school zone.

Practice Tip: File a motion for a bill of particulars requesting the Commonwealth to specify the specific location at which they contend the defendant either distributed drugs or possessed drugs with the intent to distribute them within a school zone, as well as the specific school which the Commonwealth claims was within one thousand feet of the alleged criminal activity. A defendant should be entitled to this notice in a bill of particulars in order to investigate and defendant against a school zone charge. If the Commonwealth does set forth this information in a bill of

particulars, it should then be precluded from shifting its theory mid-trial, as happened here, regarding the location of the alleged school zone violation.

The Appeals Court further held that even if it was error for the officer to testify that he "believed" he had witnessed the defendant deal drugs to another individual in the parked car, the unobjected to error did not create a substantial miscarriage of justice because the Commonwealth otherwise "provided strong proof that the amount of drugs [later found in the defendant's car] was not consistent with personal use."

Practice Tip: In concluding that the Commonwealth had "strong proof" that the five bundles found in the defendant's car "was not consistent with personal use," the Appeals Court relies on other testimony of this same police officer, a percipient witness and the Commonwealth's only witness at trial, that this amount of drugs is not consistent with personal use. In other words, this officer was permitted to testify both as a percipient witness and an expert witness regarding narcotics distribution. We must seek to prohibit this practice, which is not allowed in other contexts, see Commonwealth v. Richardson, 423 Mass. 180, 186 (1996) ("The danger of . . . implicit vouching is greater where the witness is testifying as both a direct witness and an expert, particularly where the witness offers fresh complaint testimony."), and disfavored in the drug case context. See Commonwealth v. Tanner, 54 Mass. App. Ct. 576, 579 (1998) (recognizing that "it is easy for the line between specific observations and expert generalizations to become blurred" when an officer testifies both as an expert and percipient witness). Permitting a police officer to testify as both percipient and expert witness effectively allows the officer to bolster his own credibility as a percipient witness by being qualified as an "expert." Had this officer not been permitted to opine either that he "believed" he had witnessed the defendant deal drugs or that the drugs found in the defendant's car was inconsistent with personal use, it is not clear the Commonwealth would have proven the intent to distribute element in this case.

Commonwealth v. Wilcox, 63 Mass. App. Ct. 131 (2005)

The same issue presented in Commonwealth v. Hendrick is presented here, and the Court announces the same holding in both cases (see above).

Here, **the Appeals Court also rejected the probationer's argument that the police report should not have been admitted into evidence at the surrender hearing, concluding that the reliability of statements in the police report was shown by corroborating evidence, including the probationer's own admissions. Further, the trial court judge was not required to make written findings as to the reliability of the hearsay and whether there was good cause to not call the witnesses, because Rule 6(b) of the District Court Rules for Probation Violation Proceedings only demands such written findings when the revocation is based solely on hearsay, which was not the case here.**

Commonwealth v. Kendrick, 63 Mass. App. Ct. 142 (2005)

The probationer was subject to a probationary condition that he have no contact with children under the age of sixteen. The Appeals Court agreed that the trial judge properly found the defendant violated this condition, even though the evidence showed that the probationer did not speak to, otherwise communicate with, touch or have physical interaction with any children under sixteen. Instead, **the Appeals Court held: "a violation of a probationary no contact condition may be proved by acts, such as undertaken [here], in which the objective evidence establishes to a reasonable degree of certainty that the probationer by deliberate design, acted intentionally and inconsistently with the probationary restriction, placing and interposing himself in a place wherein the probationer knew or reasonably should have known that a protected person would be present; and the probationer, having intentionally gone to such a place, remains in that critical space, looming in close proximity to persons within the protected class, thereby posing the very risk the probationary restriction was designed to insulate against."**

Commonwealth v. Bonds, 63 Mass. App. Ct. 163 (2005)

The SJC overturned the defendant's rape conviction because the trial court erroneously permitted the alleged victim's mother (a) to testify that the AV's intellectual deficiencies rendered her overly trusting and (b) to describe specific instances when this characteristic led the AV to be victimized. The Court rejected the Commonwealth's claim that this was not character evidence, but rather evidence of the AV's limited mental capacity which was relevant to demonstrate why she went to the defendant's home after he had made sexual advances to her on the phone. The Court concluded that the issue of why she went to the defendant's home was "only indirectly relevant" to the real issue in the case—whether she consented to intercourse when she arrived. Instead, the SJC held that this testimony amounted to character evidence which (1) impermissibly tended to show the AV's propensity to be victimized; (2) injected a collateral issue into the case which the defendant was not prepared to rebut; and (3) "held strong potential to elicit undue sympathy" for the AV.

Commonwealth v. San, 63 Mass. App. Ct. 189(2005)

The Appeals Court reversed the motion judge's decision to allow a motion to suppress evidence and statements resulting from a warrantless stop of a van and a subsequent frisk and protective sweep of the defendant and the van in which he was a passenger, holding: (1) the police legally stopped and blocked the van because they had reasonable suspicion to believe the occupants were involved in a breaking and entering; and (2) because the occupants were believed to be in a nighttime home invasion, "there existed a reasonable apprehension of danger that justified the protective sweep of the vehicle and exit order and frisk of the van's occupants."

Comment: Note the allowance of the protective sweep, even though there was no information that the occupants, even if involved in the home invasion, were armed or had committed or threatened any acts of violence.

Commonwealth v. Hardy, 63 Mass. App. Ct. 210 (2005)

Reversing a motion's judge allowance of a motion to suppress evidence seized from the defendant's apartment, the Appeals Court held that the affidavit in support of the search warrant for that apartment "established a sufficient nexus between the defendant's drug-dealing activity and his residence to justify a search." The following information in the warrant application helped establish this nexus: a confidential informant told the police the defendant stored cocaine in his apartment; on two occasions, the police observed the defendant leave his residence and drive directly to a location where he sold to the informant; on other occasions, the police observed the defendant leave his apartment building and drive to various locations where he met briefly with individuals and exchanged items with them. **The Appeals Court distinguished the instant case from Commonwealth v. Smith, 57 Mass. App. Ct. 907 (2003) because in Smith, the police only observed the target of the warrant drive directly from his residence to a drug transaction *on one occasion*.**

Commonwealth v. Paton, 63 Mass. App. Ct. 215 (2005)

The defendant, convicted of criminal harassment, made more than twenty appearances at a bar where the victim worked, always asking for her by name, leaving when she was not there, and staring at her when she was. When he was escorted from the bar, the defendant began appearing in other places where the victim was. **First, the Appeals Court held that the evidence was sufficient to prove that the defendant's conduct was willful rather than accidental.**

Second, the Appeals Court rejected the defendant's argument that his conduct was not malicious because he did not "act out of cruelty, hostility, or revenge," holding that the malice element is more broadly defined and encompasses the "ominous, menacing, even sinister quality" of the defendant's conduct, which was "injurious without justification, and demonstrated cruel, hostile, and retaliatory or revengeful purposes."

Finally, the Appeals Court held that the Commonwealth had sufficiently proven the element that "the conduct would cause a reasonable person to suffer substantial emotional distress." The Appeals Court rejected the defendant's position that the Commonwealth must prove "severe" emotional distress as defined in Massachusetts tort law, concluding that the Legislature intentionally used the word "substantial" instead of "severe" and looking to Webster's definition ("considerable in amount, volume, or worth") and Black's Law Dictionary ("material"). The distress suffered by the victim in this case was both substantial and reasonable in the circumstances, as "a reasonable person would be greatly disturbed by, and fearful of, the defendant's menacing and unexpected appearances, which were material invasions of her mental tranquility."

Commonwealth v. Mullane, 63 Mass. App. Ct. 317 (2005)

The Appeals Court reversed the defendant's convictions for keeping premises for unlawful sexual intercourse and keeping a house of ill fame because the trial judge erroneously admitted prior bad act evidence—that nineteen months before the events for which the defendant was indicted, two undercover police officers were offered sexual gratification for a fee at a health club at the same address as the defendant's place of business. The Court noted that the prior bad acts were not committed by the defendant or in his presence, and concluded that "any possible probative value was outweighed by its probable unduly prejudicial impact."

Commonwealth v. Kneram, 63 Mass. App. Ct. 371 (2005)

Rejecting the defendant's effort to undo his guilty plea, the Appeals Court holds that the statute to which he pled guilty, G.L. c. 138, § 34, which prohibits furnishing alcohol to those under twenty-one, does apply to the nineteen-year old defendant. Contrary to the defendant's contention that the statute is ambiguous and the legislative intent was to punish only people over twenty-one who provide alcohol to those under twenty-one, the Appeals Court concludes that the plain language of the statute—"whoever" furnishes alcohol for a person under twenty-one—is clear and applies to "all persons" and had the Legislature intended to codify the defendant's suggested limitation, it easily could have done so.

Ready, 62 Mass. App. Ct. 171 (2005)

In a trial to determine whether an individual previously adjudicated a sexually dangerous person should be discharged from commitment, pursuant to c. 123A, § 9, the trial court did not abuse its discretion in excluding the results of the Abel Assessment for Sexual Interest test. The Appeals Court "agree[d] with the judge's determination that the acceptance of the AASI test by the relevant scientific community has not been established," that testing of the AASI and peer review "has been limited in scope and substance," and that the error rate of the AASI is "unacceptable." Finally the Appeals Court agreed with the trial judge that the AASI was not relevant here, because it is a "snapshot in time" and thus does not predict future dangerousness, and the test did not focus on sexual interest in children of the particular age of boys whom the petitioner had "abused the most."

The Appeals Court further held that the trial judge did not err in denying the defendant's request to waive a jury trial, because under section 9 the Commonwealth must consent to such a waiver and no constitutional right to a jury trial exists for a section 9 trial.

Calendar of Upcoming Training Events

- **Sex Offender Registration & Notification Certification Training**
  December 5th at MCLE, Winter Place, Boston, MA. This event is mandatory for all CPCS criminal defense practitioners on the District, Juvenile and Superior Court lists- **except those who have already taken it**. This is a one-time training requirement in order to maintain your certification. If you have already attended one of the Sex Offender Registration & Notification training programs offered in 2002, 2003, and 2004 then you do not need to attend this program. Please stay tuned for news about how to register and other important details.

- **CPCS Bar Advocate Certification Training Zealous Advocacy in the District And Juvenile Courts**
  This five-day program is the CPCS bar advocate training course and it is held various times throughout the year. This course is a certification requirement for attorneys who wish to accept Criminal Cases in the District Court and Juvenile Delinquency Cases through CPCS. An attorney must complete an application and be approved by **both** CPCS **and** a County Bar Advocate Program before being admitted to the course. An application for this certification course can be found on our website at www.mass.gov/cpcs/training/zealous.htm
  Upcoming dates for this course are:
  October 24, 25, 26, 31 and November 1, 2005 (Boston)
  January 23, 24, 25, 30, 31, 2006 (Boston MCLE)
  March 22, 23, 24, 27, 28, 2006 (Location outside of Boston TBA)
  May 22, 23, 24, 30, 31, 2006 (Boston MCLE)

- **MCLE Evidence Program**
  MCLE is running a seminar entitled "**Challenging Evidentiary Issues in Criminal Cases**" on July 27, 2005 from 1:00 - 4:30 pm. Go to www.mcle.org for more info on registration and tuition.This program is chaired by Jay W. Carney and never fails to provide a great deal of information in a practical and entertaining manner.

- **CPCS Murder List Meeting** — 9/9/05 at the Worcester Public Library from 5:00 – 7:30 pm. This event is open only to members of the CPCS Murder List.

- **Confronting Crawford Understanding Its Meaning and Impact**
  The Center for Advanced Legal Studies, The Marconis Institute for Trial and Appellate Advocacy and the Flaschner Institute are jointly sponsoring a program entitled on September 22nd from 4:30 - 7:30 pm. There are several cases before the SJC in which the contours of the *Crawford* doctrine will be drawn under Massachusetts law. They are offering a reduced fee ($79.00) for lawyers who accept appointments through CPCS. For more info go to: http://www.law.suffolk.edu/academic/als/coursedetail.cfm?cid=477

- **CPCS Public Defender Division New Lawyer Training Course**
  9/9 10/7; 11/8 &9 (tentative); 12/5 SORB at MCLE; 12/8 (PD Conference); 1/12 & 13; 3/2 & 3; 4/20 & 21; 5/11 (Annual Conference); 6/21 – 23 & 26 & 27.

- **National Defense Investigator Conference**
  9/15 & 9/16 in New Orleans, Louisiana. For more information go to http://www.ndia.net and click on the "conferences" link.

- **Essex County Advanced Cross-examination program**
  October 8th and 9th. This two day seminar is open to criminal defense attorneys from across the Commonwealth. The faculty is drawn from local experienced criminal defense lawyers and nationally from the National Criminal Defense College. This is an intensive skill based program designed to help you improve your cross-examination skills. Location and registration fee to be announced soon. For more information call the Essex County Bar Advocate Program at (978) 744-7092.

- **National Criminal Defense College ADVANCED CROSS EXAMNATION**
  October 21-23, 2005 in Atlanta, Georgia. For more information go to: *http://www.ncdc.net* or call Rosie Flanagan at (478) 746 - 4151

- **National Legal Aid and Defender Association Annual Conference**
  November 16 – 19, 2005 "Defining the Future: The Fundamental Value of Justice for All" Orlando, FLA. For more information: http://www.nlada.org/Training

- **CPCS Public Defender Division Training Conference**
  12/8 at Suffolk Law School. (Open only to CPCS Public Defender Staff)

- **National Criminal Defense College THEORIES, STORIES & IMPROV**
  Spring of 2006 (dates TBA) in Atlanta, Georgia. For more information go to: *http://www.ncdc.net* or call Rosie Flanagan at (478) 746 – 4151.

- **CPCS Jury Skills Course**
  April 5, 6, 7, 10 & 11, 2006. The program is based on the two week long Trial Practice Institute at the National Criminal Defense College in Macon. However, instead of using mock cases, participants will bring one of their own cases and try it during the week. Look for future announcements regarding the application process, deadline, tuition, etc.

- **CPCS ANNUAL TRAINING CONFERENCE**:
  May 11, 2006 at the DCU Center (formerly the Centrum) in Worcester, Massachusetts.

- **National Criminal Defense College TRIAL PRACTICE INSTITUTE**
  two sessions - summer of 2006 in Macon, Georgia. Dates and applications TBA. For more information go to: *http://www.ncdc.net* or call Rosie Flanagan at (478) 746 – 4151.

THE FOLLOWING ATTORNEYS COMPLETED THE CPCS JURY SKILLS PROGRAM HELD IN APRIL, 2005

GODSON ANOSIKE
STEVEN BAUSMAN
ROBERT CONDON
MICHAEL L. D'AMORE, JR.
J. LAWRENCE KELLY
SCOTT L. MATSON
HILARY MCCAMIC
SARAH MCCLEAN
KEVIN ORME .
LORENZO PEREZ
TAMMY SHARIF, ESQ.
JOHN J. RUEHRWEIN, JR.
ANA CRNILOVIC-PHILLIPS

JASON BENZAKEN
A.J. BLANK
JULIE BUSZUWSKI
MARGARET FOX
KATE LUCIER
RADHA NATARAJAN
KATHLEEN O'CONNELL
MARCY PHILLIPS
JENNIFER SELLITTI

THE FOLLOWING BAR ADVOCATES HAVE RECENTLY JOINED CPCS

BARNSTABLE COUNTY
OLEH PODRYHULA

BERKSHIRE COUNTY
DAVID J GAFNEY

BRISTOL COUNTY
MICHAEL DELSIGNORE
JOSEPH MULHERN
JOHN COUTINHO
STEPHEN SCIALLA
SYNETH BUOR
WILLIAM TENCZAR
KRISTINE HAMMOND
SHEILA CUNNINGHAM

ESSEX COUNTY
DAVID GAVEGNANO
KARA SCHMITT
PHILLIP LAMONICA
ANTHONY ROZZI
DANIEL O'BRIEN
FRED SUNDERLAND
JAKE MEGOWEN

FRANKLIN COUNTY
GEORGE GOODRIDGE

HAMPDEN COUNTY
EILEEN B LEAHY
STEPHEN B. HUDAK
ABBE MCLANE
RICHARD O'CONNOR
MARIA T. PUPPOLO
ELLIE ROSENBAUM
JAMES B. WINSTON
BRANDON FREEMAN
CHRIS CIFUNI
RICHARD MACHADO
MICHAEL HICKSON
JEFFREY PECK
CRISTINA IANELLO

HAMPSHIRE COUNTY
BRIAN O'TOOLE
SUSAN MORAN
KEVIN KELLEY
JAMES WINSTON

MIDDLESEX COUNTY
CHRIS DIBELLA
MICHAEL MCCALL
CLIVE JACQUES
IRIS GRABAREK
WILLIAM DRISCOLL
J GARRETT HOOK
CHRISTOPH ROTHSCHILD
DAVID SINGER
W. CRAIG MAINI
DETRA MCGOVERN
SAM KOUMPOURAS
JOHN LADEROUTE
OWEN CARRIGAN
STEVE BOOZANG
ANDREW MCALEER
LILLIAN HIRALES
ALAN ZELTSERMAN
NANCY DOWLING
THERESA DIJOSEPH
SUSAN EDGETT

NORFOLK COUNTY
JAMES POWDERLY
STEVEN BOOZANG
BRUCE MURRAY
ROBERT J.P. CARTY
STEPHEN NOVICK

SUFFOLK COUNTY
JOSEPH ROMAN
ADERONKE LIPEDE
MALCOLM MEDLEY
SEAN MCGRATH
KYANA STEPHENS

SUFFOLK (CONT.)
CHANDLER MATSON
ALESSANDRA PETRUCELLI
STEVEN KIM
EDWARD SWAN

WORCESTER COUNTY
JULIAN LEBECK
JAMES WOLF
MARK CLIFFORD
ROBERT CAMPOMIZZI
CARLOS SOUSA